93d Congress
1st Session

COMMITTEE PRINT

GOVERNMENT IN THE SUNSHINE

RESPONSES TO SUBCOMMITTEE QUESTIONNAIRE

SUBMITTED BY THE

SUBCOMMITTEE ON REORGANIZATION, RESEARCH, AND INTERNATIONAL ORGANIZATIONS

(PURSUANT TO SEC. 6 OF S. RES. 46, 93D CONGRESS)

TO THE

COMMITTEE ON GOVERNMENT OPERATIONS

UNITED STATES SENATE

ON

S. 260

A BILL TO PROVIDE THAT MEETINGS OF GOVERNMENT AGENCIES AND OF CONGRESSIONAL COMMITTEES SHALL BE OPEN TO THE PUBLIC

DECEMBER 1973

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE—
24-589O WASHINGTON : 1974

COMMITTEE ON GOVERNMENT OPERATIONS

SAM J. ERVIN, JR., North Carolina, *Chairman*

JOHN L. McCLELLAN, Arkansas
HENRY M. JACKSON, Washington
EDMUND S. MUSKIE, Maine
ABRAHAM RIBICOFF, Connecticut
LEE METCALF, Montana
JAMES B. ALLEN, Alabama
LAWTON CHILES, Florida
SAM NUNN, Georgia
WALTER D. HUDDLESTON, Kentucky

CHARLES H. PERCY, Illinois
JACOB K. JAVITS, New York
EDWARD J. GURNEY, Florida
WILLIAM B. SAXBE, Ohio
WILLIAM V. ROTH, JR., Delaware
BILL BROCK, Tennessee

ROBERT BLAND SMITH, JR., *Chief Counsel and Staff Director*
ELI E. NOBLEMAN, *Counsel*
W. P. GOODWIN, JR., *Counsel*
NICHOLAS J. BIZONY, *Counsel*
GAY HOLLIDAY, *Assistant Chief Clerk*
W. THOMAS FOXWELL, *Staff Editor*

SUBCOMMITTEE ON REORGANIZATION, RESEARCH, AND INTERNATIONAL ORGANIZATIONS

ABRAHAM RIBICOFF, Connecticut, *Chairman*

JAMES B. ALLEN, Alabama
HENRY M. JACKSON, Washington
LAWTON CHILES, Florida
SAM NUNN, Georgia

JACOB K. JAVITS, New York
CHARLES H. PERCY, Illinois
WILLIAM V. ROTH, JR., Delaware

ROBERT WAGER, *Staff Director and General Counsel*
PAUL L. LEVENTHAL, *Special Counsel*
PAUL HOFF, *Legislative Counsel*
JOHN B. CHILDERS, *Minority Counsel*
SUSAN S. GEOGHEGAN, *Chief Clerk*
HAROLD C. ANDERSON, *Editor*

CONTENTS

	Page
Statement of Hon. Abraham Ribicoff, U.S. Senator from the State of Connecticut	v
Introductory statement of Hon. Lawton Chiles, U.S. Senator from the State of Florida	VII
"An Annotated History of Florida's Sunshine Law," by Robert E. Greenberg, submitted for the record by Senator Chiles	1
Text of S. 260, a bill to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes	14
Letters sent by Senators Ribicoff and Chiles to:	
Organizations and experts in the field of legislative procedure pertaining to title I of S. 260	43
Organizations and experts in the field of executive procedure pertaining to title II of S. 260	59
Organizations and experts pertaining to titles I and II of S. 260	91
News media pertaining to S. 260	103
Responses to the letter and questionnaire on title I of S. 260:	
Askew, Reubin O'D, Governor, State of Florida	45
Butera, Robert J., House of Representatives of the Commonwealth of Pennsylvania	45
Harris, Fred R., Washington, D.C	53
Rourke, Francis E., professor, Johns Hopkins University	54
Truman, David B., Mount Holyoke College	55
Wildavsky, Aaron, University of California, Berkeley	56
Responses to the letter and questionnaire on title II of S. 260:	
Berlin, Seynour S., executive director, American Society for Public Administration	63
Davis, Kenneth Culp, University of Chicago Law School	66
Gellhorn, Walter, professor, Columbia University in the city of New York	70
Hickel, Walter J., Anchorage, Alaska	71
Jaffe, Louis L., professor, Law School, of Harvard University	72
Kaspar, Sydney H., communications director, Urban Land Institute	73
La Rocque, Gene, director, Center for Defense Information	78
Levinson, L. Harold, professor of law, University of Florida	80
Robinson, Charles A., Jr., corporate counsel, National Rural Electric Cooperative Association	82
Sorenson, Theodore C., Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y	83
Teller, Edward, Lawrence Livermore Laboratory	86
Responses to the letter and questionnaire on titles I and II of S. 260:	
Rodgers, William H., Jr., Georgetown University Law Center, Washington, D.C	95
Staats, Elmer B., Comptroller General of the United States	97
Strauss, Robert S., chairman, Democratic National Committee	102
Responses to the news media letter on S. 260:	
Bailey, Charles W., editor, Minneapolis Tribune	105
Balione, John, managing editor, the Daily Sun, Texas City, Tex	105
Beck, Lois, editor, Las Vegas Optic	106
Behringer, Fred D., executive editor, Montgomery Publishing Co., Fort Washington, Pa	107
Butler, Jack., Fort Worth Star-Telegram, Fort Worth, Tex	111
Cates, Robert E., assistant professor of journalism, New Mexico State University, Las Cruces, N. Mex	113
Clemow, Bice, editor, West Hartford News, West Hartford, Conn	114
Craig, Gordon, Booth Newspapers, Inc., Ann Arbor, Mich	114

Responses to the news media letter on S. 260—Continued Page
Finnegan, John R., chairman, Freedom of Information Committee, The Associated Press Managing Editors Association, St. Paul, Minn 115
Hubert, Dick, executive producer, Urban American Unit, New York, N. Y 116
Jencks, Richard W., vice president, Columbia Broadcasting System, Inc., Washington, D.C 117
Kleeman, Richard P., director, Association of American Publishers, Inc., Washington, D.C 118
Lampson, John, editor, the Jefferson Gazette, Jefferson, Ohio 118
Marshall, George F., Jr., Guy Gannett Publishing Co., Portland, Maine 118
Mullen, William G., National Newspaper Association, Washington, D.C 119
Ottaway, Jim, Jr., Ottaway Newspapers, Inc., Campbell Hall, N.Y 119
Rasmussen, Duane A., publisher, Sell Publishing Co., Forest Lake, Minn 120
Rosenthal, A. M., the New York Times 122
Savery, Gilbert M., news editor, Lincoln Evening Journal, Nebraska State Journal, Lincoln, Nebr 122
Small, William J., vice president, CBS News, a Division of Columbia Broadcasting System, Inc., Washington, D.C 124
Smith, Stanford, president, American Newspaper Publishers Association, Washington, D.C 124
Staudacher, Lucas G., professor, Marquette University, Milwaukee, Wis 125
Teeter, Dwight L., Jr., associate professor, University of Kentucky, Lexington, Ky 126
Wright, Richard F., news program director, WTAG, Worcester, Mass 127

OPENING STATEMENT OF HON. ABRAHAM RIBICOFF, U.S. SENATOR FROM CONNECTICUT

PREFACE

On January 9, 1973, Senator Chiles introduced S. 260, The Government in the Sunshine Act. Due to his strong interest in this legislation, I designated him acting chairman of the subcommittee for this bill. I commend Senator Chiles for his active leadership on this vital legislation.

This is one of the most important bills to come before the subcommittee in many years. It would provide greater access for the people of the United States to their Government.

The events of recent years, both at home and abroad, have shown the dangers of excessive government secrecy. They have proven the need for a Sunshine law.

But there are many complex, technical and detail questions which must be answered before such a law can be passed. The questionnaire which Senator Chiles and I sent to many interested persons and organizations, and the answers we received, is a significant first step toward solving the many problems involved in this legislation.

INTRODUCTORY STATEMENT OF HON. LAWTON CHILES, U.S. SENATOR FROM THE STATE OF FLORIDA

Supreme Court Justice Louis D. Brandeis once wrote:

> Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman.

I believe Justice Brandeis could just as well have applied these remedies to the operation of our Government. Democratic self-government and informed citizenry just naturally go hand in hand, making essential the conduct of public business in the open, "in the sunshine." Only with such openness can the public judge and express, through its vote or voice, whether govermental decisions are just and fair.

While serving in the Florida State Legislature I helped enact the Florida Government in the Sunshine Law which provided that all meetings of any board or commission of any State agency, or any other political subdivision at which official acts are taken would be open to the public at all times; minutes of these meetings of state agencies would be kept; and penalties be given for persons in violation of the law. (An annotated report on the law by Robert E. Greenberg is presented at the end of these remarks.)

The Florida Sunshine Act has a tortuous history. It was introduced in every regular session of the Florida Legislature from 1961 until its passage 6 years later. Five other States—Arkansas, Indiana, Nebraska, New Jersey, New Mexico—enacted open-meeting measures while the Florida law was being debated.

Experience under the sunshine law has shown that the open meeting principle does not hamper public business operations, but rather increases public confidence in government. I served in the Florida State Senate under Florida's law for 3 years and during that time became totally convinced that the lawmaking process was neither inhibited nor damaged. Closed doors are not necessary to sound resolution of conflicting views and interests.

When I first came to the U.S. Senate in 1971 I was very disturbed by the amount of public business I found being conducted behind closed doors and by the attitude of secrecy I saw in our Federal Government agencies. It came as no surprise to me that polls showed many citizens were suspicious of motives and had lost confidence in their government when they were shut out of the decisionmaking process.

I believed that a Federal Government-in-the-Sunshine Act was the logical consequence of the positive State experience in Florida and in other States, as well as the acceptance of the disclosure provisions in the Freedom of Information Act.

On August 4, 1972, I introduced S. 3881, the Federal Government in the sunshine bill in the U.S. Senate. At the beginning of the 93d

Congress I reintroduced that measure in redrafted form, as S. 260, essentially the same as the first draft as far as the general concept of openness is concerned.

S. 260 seeks to assure the openness of our governmental process and to restore public confidence in those processes through a simple requirement: all meetings of Federal agencies and congressional committees shall, subject to certain exemptions, be open to the public. The exemptions include those matters which would: (1) disclose matters necessary to be kept secret in the interests of national security or the confidential conduct of U.S. foreign relations; (2) relate solely to matters of committee staff personnel or internal staff management or procedure; (3) tend to charge with crime or misconduct, or to disgrace, injure the professional standing or otherwise expose any individual to public contempt or would be an unwarranted invasion of privacy; (4) disclose the identity of any informer or law enforcement agent or information relating to the investigation or prosecution of a criminal offense; or (5) disclose information relating to the trade secrets or financial or commercial information.

S. 260 also includes the requirement to keep transcripts of all meetings and make such transcripts publicly available except for the confidential portions falling within one of the specific exemptions. Citizens are assured the right to attend meetings in which they have a personal interest, and news media and other interested groups have access which would insure a broader dissemination of information on public affairs. The bill provides for open meetings of all Federal governmental agencies except the courts and the military.

In July 1973, Senator Abraham Ribicoff and I sent out letters and accompanying questionnaires on S. 260 to the media and various experts in the fields of executive and legislative procedure. The answers we received shed valuable light on this entire issue. As the subcommittee is planning to hold hearings on this bill in the near future, it was felt that the publication of this wide range of opinions and suggestions on this legislation would be extremely helpful.

Most of the respondents supported the general sunshine approach to government. Don Hertzberg, past president of the Eagleton Institute of Politics and presently dean of Georgetown's Graduate School, for example, wrote:

> Both as individuals and as a collective body, members of Congress have as their sacred duty under the Constitution the function of providing their constituents with the most efficient and non-discriminatory legislation possible. Moreover, Congress has both the means and the integrity to restore the public confidence in government and its institutions which has been so unfortunately eroded in recent times. S. 260 is a welcome first step in the direction of fulfilling these twin goals.

And Professor Harold Levinson at the University of Florida's Holland Law Center believes one of today's "most urgent needs is to open up the processes of government to public view and, to the extent feasible, public participation." S. 260, he believes, represents a step in this direction.

Many of the responses we received contained only general comments, most in support of the broad scope of the proposal. Some letters addressed each individual question faithfully in detail, while others used

the questions only as a general guideline for their comments and took the initiative of providing suggestions to further improve the bill.

Also included in the responses were some thoughtful criticisms—pointing out, for example, the "dangers" in opening up committee meetings to the public and press. Some answers to these points were provided by Georgetown law professor William Rodgers, and others.

Professor Rodgers wrote us:

> I don't buy the argument that open meetings lead to filibustering, showboating and wheelspinning. They offer instead a rare opportunity for a candid look at how legislators work. Every prediction of disaster is repudiated by actually experience. The media has better reporting opportunities and is less dependent upon the unverified or self-serving leak. The special interests can better extend or withhold their support on the basis of performance not promise.

I have looked upon S. 260 from the outset as a broad-point of departure and thus looked forward to and was encouraged by the suggestions offered in the answers to our letter and questionnaire. Suggestions for more specific definitions for "meetings," for "expert testimony," for just what constitutes a "multimember Federal agency," etc. are sprinkled throughout the letters, which vary considerably in breadth and depth of treatment. Yet each letter offers a valuable perspective and certainly taken together, a wide range of issues are set forth, problems pointed out—all deserving of further study and research before formulating a final version of the legislation.

All of us know of the feelings of alienation and frustration so many people feel toward government these days. As government has grown, it seems to have gotten farther away, out of the reach of the people it was designed to serve. Government is not responsive enough; there is too little communication, too little understanding, and too little trust.

I believe a good deal of this problem is due to the aura of secrecy that surrounds too much of our Government—in most cases totally unnecessary secrecy.

If the final decision and amendment process is conducted in such an atmosphere, is there any wonder that questioning of our legislators' motives results? We all recognize that sound reasons exist for some closed or executive sessions, but how is the public to know whether a closed meeting is held for the personal gain of the legislator or in the best interests of the public?

The closed-door practice in Congress is contrary to the spirit of our Constitution and the intent of its framers. Article I, Section 5, of the Constitution provides that—

> Each House shall keep a journal of its proceedings and from time to time publish the same, except such parts as may in their judgment require secrecy . . .

The aim of this provision was to insure that the public's business be conducted in public; this in direct relation to and desire to avoid the English parliamentary practice of closed sessions.

That tradition of closed sessions had extended to the meetings of the framers of our own Constitution—but not without the critical comments of Thomas Jefferson, in a letter to John Adams:

> I am sorry they began their deliberations by so abominable a precedent as that of tying of the tongues of their members. Nothing can justify this example but the innocence of their intentions, and ignorance of the value of public discussions.

Living today as we do in a complex time when people are fearing loss of identity to a growing government that threatens to completely dominate them and is ever more difficult to understand, there is need now to rid ourselves of the "abominable precedent" Jefferson spoke of, and to instead expose our governmental processes to the fullest extent possible.

I am hopeful that through the Subcommittee's hearings and through analysis of the responses printed in this publication, we can come up with a workable law that will serve to promote better government and the greater public confidence which will serve in itself to strengthen our democratic process.

An Annotated History of Florida's "Sunshine Law"

(By Robert E. Greenberg)

THE BEGINNING

On April 12, 1961, Senator Cliff Herrell of Miami introduced a bill to ban secret meetings by governmental agencies.[1] It heralded Florida's first attempt to replace "molehill government" with "government in the sunshine."

Herrell's bill carried no penalties for officials who conducted public business in private.[2] The proposed law provided that "no administrative body of the state, a county, district or city shall hold meetings which are closed to the public." [3] The prohibition applied to informal gatherings, as well as formal, if official business was the subject of the meeting. Meetings concerned with confidential investigations, merit examinations, unsubstantiated charges against personnel, land acquisitions where premature disclosure would increase prices and state secrets would be exempt.[4]

A similar proposal by Senator J. Emory Cross [5] of Gainesville included a penalty for violation of the open meeting requirement.[6] This same bill, when introduced in 1967, eventually became § 286.011, Florida Statutes, or the government-in-the-Sunshine Law [7] After its introduction in 1961, the issue died in committee. The same fate awaited it for five more years. One newspaper characterized the vote as ". . . wise cracking, laughing . . ." at Floridians, denying the people public meetings.[8]

State Attorney General Richard W. Ervin favored and apeared on behalf of the proposed legislation. It was his hope to create some sort of "honor system" to provide a rule of conduct which the cabinet, county commissions, and state agencies could follow.[9] "I believe this bill would create more confidence in government." [10] Though private meetings are "more expeditious," Ervin felt that secrecy caused more errors in judgment than public meetings.[11] "Where you know what you say and do is going to be put down," public officials are inclined to be more cautious.[12]

The success of the embryonic Sunshine Law may well have been caused by the federal court decision requiring new elections in accord with one man, one vote reapportionment, to balance the urban-rural percentage that had for so many years been tipped against the more liberal cities. One could say that when the "porchoppers" lost control of the Legislature, Sunshine's passage was inevitable.

Fortuitously, the Senate chamber was then engaged in a debate over "executive sessions" and their abuses. The media had been aroused when one of their number refused to leave one of these sessions and was forcibly ejected.[13]

GOVERNMENT-IN-THE-SUNSHINE: APPENDIX A

On April 13, 1967, S.B. 9, later to become § 286.011, Florida Statutes, was placed on the Senate calendar, the first time in history such a measure survived committee politics.[14] "The public's business should be conducted in public; . . . this won't completely stop secret huddles but it will require that discretion be used." [15]

Two days later the bill was passed by the Senate and sent to the House [16] where three amendments were offered. The Senate agreed to one amendment vesting the Circuit Courts of the state with injunctive powers to prevent future violations, and rejected two others exempting personnel and other secret matters from the purview of the law.[17]

Perhaps the best account of the drama on the floor appeared in a Tampa newspaper article: [18]

"The government in the sunshine bill whipped back and forth between the two houses of the legislature yesterday like a woman scorned."

Footnotes at end of article.

The Tampa Tribune reported on June 28, 1967 that Nebraska had that day passed an "open meeting" bill similar to the Florida proposal. "It requires any governing body using public money or recommending such spending to hold meetings open to the public." The media would not forget.

When the government in the sunshine bill finally emerged from a joint House-Senate Committee, it was intact, with the addition of the injunctive remedies now available.[19]

THE FIRST DECISION: APPENDIX B

In 1969, the Dade County Circuit Court issued what amounts to the first reported opinion interpreting the government in the sunshine law, in *Berns v. City of Miami Beach.*[20]

The newspaper publisher, editor, and a reporter of the Miami Beach Sun,[21] filed suit charging the defendant city and its councilmen with holding secret meetings in violation of the government in the sunshine law.[22] The relief prayed for was an injunction prohibiting the council from holding any more meetings at which official acts were to be taken where the public was excluded.

The complaint alleged that defendants caused the reporter to be arrested and charged with disorderly conduct for refusal to leave the city manager's office; that the reporter's conduct was at all times peaceful and orderly; and that his refusal to leave the office was based solely on the belief that the defendants were contemplating holding a secret meeting; and that he was under instructions from his superiors at the newspaper to cover all of the defendants' meetings, secret or otherwise.[23]

The defendants countered by admitting that they had "gotten together" in private, usually in the city manager's office, and usually an hour or so before the regular city council meetings.[24] The defendants described these pre-meeting meetings as "briefing sessions," "conferences," or "backgrounders." [25] The public and press were neither aware of the times of these sessions nor permitted to be present.[26]

Judge King, in granting a permanent injunction, held that there is no such right to hold such meetings under the Sunshine Statute. "The legislature did not exclude, by subject, certain matters which could be discussed in private. It is the prerogative of the legislature to specify those matters which must be considered as public meetings and if they so elect, specify those matters which may be considered privately." [27]

Notwithstanding the court's finding that voting did in fact take place behind closed doors, the judge felt that, " . . . the purpose of this opening meeting statute would be frustrated if the entire deliberative process could be held behind closed doors only to emerge in public for a show of hands." [28]

With all the clamor that has preceded and followed the enactment of the Sunshine Law, concerning what is covered and what is not, Judge King had no trouble in reading the statute to effect Senator Cross' intent:

"The Florida Legislature has mandated that the public has the right to know without exception, when, how, and why its business is being conducted. Deliberations, sessions, conferences, briefings, expressions, discussions, proposals, recommendations, actions, reports, etc. must be open to the public, *for these are as much official acts as the final vote itself.* The legislative intent is clear. The collective acquisition and exchange of facts by the defendants is required to be made in public. The reasons for and against a choice of a course of action are 'official acts.' Obviously, the vote cannot be had without the prior receipt and exchange of ideas and information." [29] (Emphasis added.)

In the court's findings the trial judge mentioned, *inter alia*, that the plaintiffs had standing to sue.[30] At this point one must speculate whether the pending criminal charge entered into the judge's decision. Further, it is not made clear whether the Sunshine Law will be deemed a valid defense in the instant case; rather, the judge enjoined the defendants from continuing the prosecution of the plaintiff reporter.

Various other newspapers [31] reported Sunshine violations; In Alachua County the members of the school board met at the home of the acting chairman during the 1968 teacher crisis—the meeting held at night was termed a coffee get-together instead of a meeting. The city commissioners of Stuart, Florida were indicted and suspended by Governor Kirk for holding secret meetings for which they kept no minutes, while they parceled out bonuses to two city employees. In

Footnotes at end of article.

Alachua County in 1969 the State Attorney and the State Auditor refused to divulge any information concerning the fiscal affairs of the Court of Record, then under investigation.

Commenting on the secret investigation of the Court of Record, the Gainesville Sun editorialized:[32] "Our purpose for reading such facts into the record is a simple one. We think government-in-secrecy is a mistake which undermines public confidence. And we don't think such mistakes should be repeated."

TIMES PUBLISHING—FIRST APPELLATE REVIEW: APPENDIX C

Times Publishing Company v. *Williams*[33] represents the first considered opinion of a Florida Appellate Court construing the government in the sunshine law.

The appellants, Times Publishing Company,[34] filed a complaint in the Pinellas County Court alleging that the county school board had held various secret meetings during 1967 and 1968, subsequent to the enactment of the Sunshine Law. At the conclusion of the testimony, the trial judge denied plaintiffs' prayer for an injunction to preclude such future activity.

On appeal, the appellants contended that "injunctive relief is available to the members of the public to enjoin and prohibit the Board of Public Instruction of Pinellas County, Florida, from holding meetings at which official acts are to be taken if the public is to be excluded." [35] Appellants also urged that whenever the board met "informally" or for any purposes relating to the operation of the schools and excluded the public, the board was violating the statute and should likewise be enjoined from holding such secret meetings.

The court found, as a matter of law, that since the act relates to ". . . all meetings . . . at which official acts are to be taken . . .", it is obvious the legislature intended to extend application of the "open meeting" concept so as to bind every board or commission of the state, or of any county or political subdivision over which it has dominion or control.[36]

The Court felt that the Government in the Sunshine Law was a "declaration of public policy, the frustration of which constituted" irreparable injury to the public interest.[37] To effectuate this policy, it was the entire *decisionmaking process* that the legislature intended to affect by the enactment of the statute. "Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern." [38] Every step in the process culminating in a decision, is an indispensable requisite to "formal action"; it therefore follows that each such step constitutes an "official act," an indispensable requisite to "formal action," within the meaning of the act.[39]

In interpreting the intent of the legislature, the Court came to the conclusion that "official acts" cannot be limited to "formal action." The formal act of voting on an issue, or the formal execution of an official document, easily ascertainable from the record, encompassed only a fraction of the real need for the act's creation. "It is how and why the officials *decided* to so act which interests the public." [40] ". . . the legislature could only have meant to include therein the *acts of deliberation, discussion,* and *deciding* occurring prior and leading up to the affirmative "formal action" which renders official the final decisions of the governing bodies." [41]

The Court then went on to deal with the question of exceptions to the open meeting mandate of the act; specifically, where personnel matters were involved.

As a matter of law the court held that, "any rights or privileges (here personnel matters) . . . third parties might have must be found elsewhere," and the agencies, etc. governed by the sunshine law could not rely on the rights and privileges of these third parties to disregard and circumvent the provisions of the act.[42]

In keeping with the notion that personnel matters were not legally protected, the Court left open the door for future "real" privileges. "The attorney-client relationship is a unique one under the law. Within this relationship both the attorney and the client enjoy rights and privileges independent of each other.[43] Clearly, the area of the attorney-client relationship which is excepted from the statute is that which would conflict with the ethical obligations of the profession. "It is our conclusion, therefore, that the legislature is fully aware of its constitutional limitations and did not intend . . . to place attorneys in a position of

Footnotes at end of article.

having no alternative but to violate the Canons of Ethics." [44] All other consultations between the public agency and its counsel are precluded, "since the public has waived any privilege of confidentiality it may have by virtue of such relationship." [45]

FORESEEABLE ACTION TEST: APPENDIX D

In *Board of Public Instruction of Broward County* v. *Doran* [46] the Florida Supreme Court held that the statute was sufficiently precise and afforded adequate standards to afford due process to those charged with violations of the law.

As per the previous cases the plaintiffs alleged violations of law, seeking an injunction to prevent such future activity.

In its answer, the defendant school board admitted that members of the board meet for an informal conference at which no official acts were to be taken or were taken, and at which time the public was excluded; thereafter the board would hold "open," public meetings. The affidavits of the several parties indicated that there were several occasions when the board retired to discuss matters in private, though no formal action was taken.[47]

In determining that the statutory language provided adequate guidelines the court adopted a "foreseeable action" test. "The obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board." [48]

In short, the statutory language conveyed a definite warning as to proscribed conduct when measured by common understanding or practices.[49] "Statutes enacted for the public benefit should be interpreted most favorably to the public."

"One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made." [50]

In referring to the law as clarified by the Court, one official described it as "that idiot decision." [51] "If it doesn't make liars out of us, it makes connivers out of us." [52]

In retrospect, compliance at first was slow and officials in some areas seemed convinced the law implicitly contained certain exemptions.

The 1969 decision in *Times Publishing Co. v. Williams*, supra,[53] was a significant step in developing an expansive interpretation. Subsequent rulings removed all clouds as to the full impact of the law.[54] A survey by the Associated Press revealed that dramatic changes in the management of government had begun.[55] Among the more striking examples,

(1) The Orange County Commission no longer bodily removes reporters when they are not wanted; [56]

(2) The Broward County School Board (the defendant in the *Doran* case) acquiesced; [57]

(3) The State Cabinet's longstanding practice of breakfast at the Duval Hotel and coffee in the governor's office prior to the regular meeting has collapsed; [58]

(4) The State Board of Regents' frequently-invoked rule of excluding reporters when selection of a University president has come up has been ended; [59]

(5) The Miami Beach City Council, famous for its meetings in the back room of Mendelson's Meat Market, is now conducting business in the open; [60]

(6) The Leon County School Board no longer holds secret sessions while discussing integration, and choice of a consultant; [61]

(7) The Lee County School Board no longer closes its doors in attempting to deal with recurring teacher disputes; [62] and

(8) The St. Petersburg City Council has abandoned its long famous "executive session," partly because of the Supreme Court, partly because the three new members elected had all campaigned against the practice.[63]

The radical changes brought by the Sunshine Law seemed to catch many officials in a state of shock and disbelief.

Two schemes designed to circumvent the effects of the newly vitalized law were quickly instituted: (1) two-party meetings and (2) proliferating memoranda.[64] The two-party meeting operated thus: The head of the board would meet with other members of the board, one at a time, on a touchy subject until some consensus had been arrived at, or at least until all the members of the board had been briefed sufficiently on its background, so that no debate need occur at a

Footnotes at end of article.

formal meeting.[65] Utilization of memos, one after the other between commissioners or board members would eventually "type out" an issue.

Perhaps the greatest challenge to the law came in the form of threatened libel suits for damaging and libeling discharged public employees.[66] One Commission Chairman voiced his intent to seek legislative changes in 1970 to exempt personnel, legal matters, and condemnation proceedings from the law's purview.[67]

THE QUASI-JUDICIAL EXCEPTION: APPENDIX E

On January 27, 1970, the First District Court of Appeal admitted an exception to the Government in the Sunshine Law.[68] In *Canney v. Bd. of Public Instruction of Alachua County*,[69] petitioner sought review of the board's action in suspending him from school for failing to comply with a hair styling regulation.

While the main thrust of the opinion was concerned with the fulfillment of due process requirements in administrative proceedings, and the validity of a regulation pursuant to legislative authority in the absence of some judicial determination, the question of Government in the Sunshine arose in connection with the board's recess to reach a decision in the case.[70]

The Court held that the School Board was acting "in a quasi-judicial capacity," and the conference held by it was privileged and did not fall within the purview of the (Sunshine) statute.[71]

For purposes of controlling authority, one district is not bound by the decision of a sister district, and therein lies the basis of conflict *certiorari* to the Florida Supreme Court.[72] The District Court of Appeal for the First District observed that notwithstanding the Second District's dicta to the effect that quasi-judicial functions were not excepted by the Legislature from the application of said statute,[73] "the Legislature is not empowered, by statute or otherwise, to prescribe the conduct of the internal government of the judicial branch." [74]

The rationale used to reach this result was ambiguous at best. The Court at the outset established that the Legislature may create and vest county school boards with quasi-judicial functions; however, once so endowed with judicial [75] characteristics, the Legislature prerogative ceased to exist.[76]

Analyzing the school board's recess to the "conference room of the Supreme Court of Florida" or the "petit jury room" when the deliberations are "taking place,[77] the Court held that "neither the public nor the press has any more right to enter into the judicial deliberations of the members of a county school board of public instruction. . ." [78]

RENEWED NOTICE UNNECESSARY: APPENDIX F

In *Shaughnessy v. Metropolitan Dade County*,[79] the Third District Court of Appeal held that a continued matter may be disposed of at a later specified meeting without the necessity of repeating the notice or public hearing requirements of the Sunshine Law.[80]

The Zoning Appeals Board of Dade County, after notice and public hearing, dead-locked over whether to grant an application for a special use permit, and set the matter over to a later specified date, and acted thereon without further notice or public hearing.[81] When the county commission ratified the Board's action, the appellant commenced this action.

The appellant's allegations specified that the Zoning Appeals Board failed to abide by the provisions of the Sunshine Law, in that it failed to give the required public notice about the meeting wherein the second vote was to be taken.[82]

The *per curiam* opinion held that "all official action of the Board as it appears from this record was taken in open public meeting," and did not thus violate either the provisions of the law or those appellate decisions interpreting the same.[83]

BERNS REVISITED: APPENDIX G

The following year the *Berns* case was reviewed by the Florida Supreme Court, *sub nom, City of Miami Beach v. Berns*.[84] The Court held on rehearing that where public officials meet at a time and place to avoid being seen or heard by the public to transact or agree to transact public business at a future time in a certain manner, they violate the Sunshine Law, regardless of the formality or lack of formality the meeting takes.[85]

Footnotes at end of article.

Section 165.22, Florida Statutes provides in part that:

All *meetings* of any city or town council or board of aldermen of any city or town . . . shall be held open to the public . . . (emphasis added).

In *Turk* v. *Richard*,[86] a 1950 case, the Court held that the *open meeting* requirement only applied when a municipal council was assembled in a formal session attended by a quorum.

The crux of the Court's rationale in the *Berns* case, prohibiting any meeting whether or not a quorum is present, rested on the language the legislature chose *not to follow* when drafting section 286.011, Florida Statutes ". . . (I)f the intent of the Legislature had been to include only *formal assemblages* for the transaction of official business," [87] it would not have been necessary to "include a provision declaring certain meetings as *public* meetings." [88]

The Court opined that in enacting this pipece of legislation a "general revision of the law applicable to open meetings of public agencies" was intended.[89] Therefore, in such a situation, whether or not this right to attend meetings existed at common-law, or whether or not the two statues are harmonized, "we are persuaded to apply the rule that a statute enacted for the public benefit should be construed liberally in favor of the public . . ." [90]

The Court then reinforced the *Williams* [91] and *Doran* [92] principles that: (1) Legislature intended to expand the open meeting concept to bind every political subdivision or agency over which it has dominion; (2) the obvious intent was to cover gatherings where the individuals will deal with matters on which *foreseeable action* may be taken at a later time; and, (3) the proscriptive conduct [(1) & (2)] is not to be circumvented by matters that are privileged, pertaining to the duties and responsibilities of subject bodies.[93]

A secret meeting, the Court said, occurs when officials meet so as to avoid being seen or heard by the public.[94] Whether the meeting is formal or not, such secretive action violates the Sunshine Law. "It is the law's intent that any meeting, relating to any matter on which foreseeable action will be taken, occur openly and publicly." [95]

The opinion contains several warnings; it warns those who are in doubt whether they are convening in violation of the law to leave the meeting forthwith,[96] and it warns those who hope to push the statute beyond debatable limits that the majority of the Court will meet future problems on a case by case basis as they arise.[97] The Court stated:

"The Legislature did not intend to muzzle lawmakers and administrative boards to an unreasonable degree. It would be contrary to reason and violate the right of free speech to construe the law to prohibit any discussion whatever by public officials between meetings. *The practice of discussing politics and government is part of our American heritage . . .*" [98]

Thus if there is no intentional secrecy involved, legislators can meet and discuss their business without worry. "It is only the evil of closed door operation of government without permitting public scrutiny and participation" that the law seeks to prohibit.[99]

A joint session of the City Commission of Gainesville and the Alachua County Commission at a local inn was scuttled on February 3, 1971, in deference to the Sunshine Law.[100] The same day the Gainesville Sun ran an editorial entitled "Statehouse Orgy;" its focus was the Sunshine Law.[101] After lauding its accomplishments the editorial continued:

"But we are disturbed by recent developments. Not only has Secretary of State Stone removed the door from his office but . . . an Associated Press . . . reporter . . . (has) . . . interrupted a corporate income tax strategy session between Governor Askew and other legislators . . . (I)t appears (that) some of these fellows are trying to love the Sunshine Law to death. What we see is an informational orgy, put on foot by officialdom and naively joined by newsmen, to make the Sunshine Law unworkable." [102]

I would not call it a conspiracy, but clearly a good many politicians in Tallahassee were hoping that the news media and the people would prove the law unworkable, to provide ripe justification for repealing the same. The editorial was timely warning of a growing movement.

Footnotes at end of article

Just five days later, Governor Askew called for moderation in the interpretation and application of the Sunshine Law. The Governor was quoted as saying that certain "difficult areas" exist in government which do not lend themselves to coverage by newsmen, citing legislative strategy meetings as an example.[103] "The question is can you not talk to anyone about the business of the state until and unless the representatives of the press hear your every word?"

Governor Askew was required to throw open an "invitation only" dinner meeting between himself, the Cabinet and Capital Center architects, on March 10, 1971, because of the Sunshine Law.[104]

On March 3, 1971 Attorney General Shevin rendered an opinion that held *inter alia* that the press and public had the right to listen in on telephone conversations between public officials.[105]

Responding to this, H. G. "Buddy" Davis, the Pulitzer Prize winning journalist who wrote the "Statehouse Orgy" editorial in the Gainesville Sun, was quoted as saying: "When a responsible guy goes around and says two officials have to invite reporters to listen to a phone conversation—that's ridiculous." [106]

"Loving the law to death," Davis said, "would make the law so obnoxious and so impossible, and so unworkable, it'll have to be changed or repealed. It's just that simple." [107]

Attorney General Shevin in the telephone opinion had also ruled that the phrase "at all times" prevents a board from holding a secret ballot, though the vote would be replayed at a subsequent public meeting.[108] If members of the press and the public were *deliberately excluded* from the public offices furnished for the conduct of the public's business, there would then be a Sunshine Law violation in the opinion of the Attorney General.[109]

Then perhaps Mr. Davis overstated the impact of the "telephone" ruling. Relying on *Williams* and *Doran*, certain telephone conversations which are part of the deliberative process which would ultimately lead to recorded action at a formal public meeting could not be conducted covertly.[110]

In a March 6, 1971 interview with the Gainesville Sun's Capital Bureau correspondent, the author of the Sunshine Law, J. Emory Cross, mused that the public meeting law has suffered "telling damage from recent Court and Attorney General opinions." [111] "What they do is make it absurd," categorizing Shevin's telephone ruling as "way out" absurd.[112] The other major snafu according to Cross is the Supreme Court ruling that the law applies, even if there is less than a quorum present. "Cross said he thought that was clearly put, indicating he did not intend to prevent a couple of public officials meeting for dinner or talking on the phone for fear of violating the law." [113]

Perhaps hardest hit by the Sunshine Law are the county officials, because they work on problems requiring decisions daily. What happens when several, say two, county commissioners meet with the public utilities director, or plan board member; or if they sit down and talk over a cup of coffee; are they taking "official action?" Must they give prior notice?

Most city or county commissioners polled by the Melbourne Times in 1971 felt that it was not a violation, and if it was, then the law was too extreme.[114] "If I had a choice of the Sunshine Law or nothing, I'd take the Sunshine Law." [115]

Refining the law

In an effort to clarify an earlier opinion the Attorney General of Florida opined on March 31, 1971, that if a school board voted for a new superintendent by code number rather than by name there would be no *per se* violation of the law, provided that all the facts available to the board would also be available to the public and press, and that all such votes or other actions of the board be open to the press and public.[116]

On the question of the validity or invalidity of action taken by a public body in violation of that law, it was Shevin's opinion that it is not void *ab initio*, but rather voidable, and may be corrected by subsequent re-enactment *nunc pro tunc*.[117]

In the 1971 Legislative session several bills were unsuccessfully introduced to modify the Sunshine Law.[118] One bill listed six exceptions to be written into the law that would have virtually repealed open-meeting requirements. The amendment provided that quasi-judicial bodies, matters of national security, land transactions, personnel problems, conferences with attorneys, and other "sensitive matters" would be allowed behind closed doors.[119]

Footnotes at end of article.

Another defeated amendment would have provided for closed door sessions to deal with "matters which, if discussed in public, would be likely to benefit a party whose interests are adverse to those of the general community." [120]

In testimony before the House Governmental Organization and Efficiency Committee, Attorney General Shevin urged defeat of the above bills charging public officials: "Give politicians an excuse to violate the government-in-the-sunshine law, and that's what they will do." [121]

"If you give these exemptions 1-2-3-4, they will do more than 1-2-3-4 when they get behind closed doors. I think it would be a step backwards to amend this law." [122] The law, according to the Attorney General, was not hard to interpret as long as the basic point, that elected officials are to be prohibited from deliberately trying to exclude press and public, is kept in mind at all times.

Members of the Florida Society of Newspaper Editors felt that politicians were exaggerating when they said newsmen wanted to listen in on telephone conversations. "Our concern is with closed meetings or hideaway meetings by a quorum or committee with the authority to act." [123]

On May 5, 1971, four years after the bill passed into law, the first convictions under the Sunshine Law were recorded.[124] The Mayor and Vice-Mayor of North Lauderdale were convicted of holding "many secret" meetings, including one discussing the future dismissal of the town's police chief. This particular secret meeting was held in the back of a town police cruiser.

The Florida Sunshine Law does not apply to federal agencies operating in Florida.[125] According to an Attorney general's opinion, the Sunshine Law only applies to state agencies. The question may again be brought up, because the agency in this particular case had open meeting rules promulgated by the Director of the program, under the 1964 Economic Opportunity Act. For most purposes, section 1.01 Florida Statutes, defining "political subdivision," is applicable to determine the Sunshine Law's status and effect.

In his effort to bring the most sunshine possible to bear on public meetings, the Attorney General, in late October of 1971, announced that notice of an official meeting should be given when official matters are to be considered and discussed, even though the public body's membership is less than a quorum.[126]

On November 11, 1971, the father of the bill announced that it was never the intention of the statute to prohibit governmental bodies from appointing committees to deal with sensitive personnel matters, "as long as final action was taken publicly." [127] There is no reason why "committees of less than quorums ought not to be able to handle the gory details without throwing it all in the open." [128]

Cross welcomed the Attorney General's Opinion requiring prior notice. Cross had hoped to introduce an amendment to the law to achieve that desired goal, "it was never my intention just to let in the press and call it a public meeting." [129] The former state senator also was heard to say that the *Canney* decision's "quasi-judicial" rule would "be a tremendous blow to the Sunshine Law because every time a board wants to close a meeting it can invoke the quasi-judicial ruling." [130]

In what may be the first interpretation loosening the Sunshine Law's stringent requirements, the Attorney General ruled on November 11, 1971 that members of a public body may jointly inspect the physical characteristics of a matter upon which they are to take subsequent official action.[131] Shevin ruled that even though the *public is not invited* to attend or participate, *it is not a secret meeting* which is outlawed by the Sunshine Law. The *press and staff* were *present*, which *minimizes* the possibility of *secret* action.

Is the public's receiving adequate advance notice no longer a prerequisite? Does the presence of media representatives vitiate the secret meeting aspects of this particular excursion, or has it come to mean that the media may stand in place of the public to preserve the open meeting status of a public body's function?

One month later Shevin ruled that a purely advisory body is not within the purview of the law, but a body having statutory powers and duties that are governmental in nature should hold its meetings in the sunshine even though it functions only in an advisory capacity.[132]

An opinion reaching even further was published in January, 1972, holding that two or more legislators may not hold a secret meeting with the intention of

Footnotes at end of article.

excluding the press and public, so as to decide upon a course of action pertaining to legislative matters.[133] According to the opinion there would appear to be no violation if it were in full view, without prior arrangement, where the press or public could have access.

One month later, Senate President Jerry Thomas announced that the law does not apply to the Senate, but only to boards or agencies, and therefore legislators could ignore the previously noted Attorney General's Opinion.[134]

A NEW EXCEPTION IS CREATED: APPENDIX I

The latest chapter in the Sunshine Law's turbulent history concerns collective bargaining of public employees and the effect of the Sunshine Law. In *Bassett* v. *Braddock* [135] decided on May 17, 1972, the Florida Supreme Court held that labor negotiators employed by a school board in preliminary or tentative teacher contract negotiations could negotiate outside of public meetings without violating the Sunshine Law, and that these negotiators would be insructed or consulted by the school board privately.

The Court felt constrained to "merely affirm the lower court's action," so as not to "deny the public employees' rights to bargain collectively as guaranteed" by the Florida Constitution.[136] It could be well argued that the Court was with reservation "judicially implementing" the Constitutional collective bargaining provision in the absence of satutory guidance, without regard to the means employed.

The appellee school board's argument was simply that the statute's "intensity of the sunrays . . . could cause a damaging case of sunburn to those employees or to the public which elected the board.[137]

The Court sustained the lower court's finding of fact that "meaningful collective bargaining would be destroyed if full publicity were accorded at each step of negotiations." [138]

The public's negotiators, the Court went on, must not face the "Goliath" (employee negotiators) with all its cards exposed. There must be "an equal position" afforded the school board in relation to those with whom it must deal. "The public should not suffer a handicap at the expense of a purist view of open public meetings, so long as the ultimate debate and decisions are public and the 'official acts' and 'formal action' specified by the statute are taken in open public meetings." [139]

In this particular instance the negotiator could not bind the Board, and in fact his recommendations were later modified by the Board in open public meetings. Whether Attorney General Shevin pointed to his earlier opinion on the subject in the State's *amicus curiae* brief is unknown at this time.[140]

The Court clarifies its earlier position by shifting the emphasis from "matters on which foreseeable actions will be taken by the Board" to "official actions" taken at "meetings." Classifying the labor negotiations as preliminary deliberations which "may never result in any action taken," the Court neatly comes full circle to conclude that the Sunshine Law does not apply "where there is no relationship at all to any meeting at which any foreseeable action is contemplated." [141]

In concluding its opinion the Court felt that common sense and fair play required the Board to be allowed to privately confer with its negotiator, because the public employees could do so at any time. The Court apparently forgot that public employees do not have the right to strike under the 1968 constitution.

In a stinging dissent, Justice Adkins declared: "Thus far the government in the sunshine law has withstood various attacks where a few misguided local boards and agencies have attempted to seek a means by which they could circumvent the law so as to resume secret meetings.[142]

"The right of the public to be present, to be heard, and to participate should not be circumvented by having secret meetings of various committees appointed by the Board and vested with authority to make recommendations or suggestions to the Board concerning a matter on which foreseeable action may be taken." [143]

CONCLUSION—THE FUTURE—THE AUTHOR

Perhaps more than anything else this history of the Sunshine Law has indicated several of the problems, potential solutions, opinions and reactions to the

Footnotes at end of article.

Government in the Sunshine Law. I have deliberately waited to this point to relate my own interview with the law's author, Emory Cross.[144]

Mr. Cross' major concern is two fold: (1) The debilitating effect of the "quasi-judicial" exception; and (2) "Shevin's absurd ruling" that the law applies when two or more public officials congregate. "The quasi-judicial ruling in *Canney* is like Lincoln's old saying: calling a dog's tail a leg does not make it so—calling an agency quasi-judicial does not make it so." As to the Attorney General's two-or-more ruling, Cross cannot understand it, "Shevin supported the bill as a legislator in 1967, how could he do this? I meant a quorum, because final action is impossible without a quorum. If they had interpreted it like I wrote it, they would have been able to exempt personnel problems."

When I queried the former Senator as to some of the oddities the law fostered he became emotional, claiming he never thought the media would crash a cabinet meeting unless there was a quorum present. Also, he felt that Jerry Thomas was wrong—"The Senate is included in the law—the new constitution cuts down the right to go into executive session—right down to the bone."

Cross feels that had the courts not fumbled the "final action" notion, the main argument (personnel problems) against the law would have withered away. Cross likes to tell an anecdote to those who favor secret personnel sessions. He tells the story of the Racing Commission attorney who argued in favor of secrecy because "we get all kinds of addicts and felons etc. applying for jobs, and well—occasionally one slips by us." My goodness, bellowed Cross, that's exactly why we need the law!

The former Senator is sure that there are "people working underground to screw it up. Legislators dislike it but they are afraid to change it because the press and the public like it." Because of this he doubts if any amendments will pass for quite some time: "The media has a right and a responsibility to be there and inform the people—they have acquired the responsibility to see it is not repealed."

When I questioned the former state senator on his views on amendments he offered three:

(1) spell out the need for a quorum to reverse Shevin's ruling;

(2) include quasi-judicial functions of administrative agencies (reverse *Canney*);

(3) require the prior publication of agendas at all regularly scheduled meetings, and also at special meetings if there is sufficient time to do so.

On the possibility of a federal "Sunshine Law" he thought it was feasible provided that some court or body not subject to the law could determine before hand whether certain items were "national secret" exceptions.

FOOTNOTES

[1] Fla. S. Jour. 103 (April 1961).
[2] Tampa Tribune, April 12, 1961.
[3] *Id.*
[4] *Id.*
[5] Fla. S. Jour. 125 (April 1961).
[6] Tampa Tribune, April 13, 1961.
[7] Id. In § 1 the only addition being: ". . . at which official acts are to be taken. . . ." In § 2 the original appeared as the first sentence only. § 3 containing the penal provisions was amended by Ch. 71–136. Laws of Florida (1971).
[8] Tampa Tribune, May 4, 1961. One Senator was quoted: "My people don't want it. They like secret meetings." Another was heard to say that the death vote was representative of good government.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] St. Petersburg Times, April 6, 1967, *see also* Tampa Tribune, April 11, 1967.
[14] Fla. S. Jour. 23 (April 1967).
[15] Florida Times-Union, April 14, 1967. The bill received unanimous approval in the Judiciary Committee.
[16] Fla. S. Jour. 93 (April 1967).
[17] Fla. S. Jour. 679 (June 1967).
[18] Tampa Tribune, June 9, 1967.

[19] *Id.* on June 28, 1967.

[20] 32 Fla. Supp. 7 (#68–17875 Circuit Court, Dade County, March 26, 1969) *aff'd*, 231 So. 2d 847 (3d D.C.A. Fla. 1970) *aff'd* 245 So. 2d 845 (Fla. 1971).

[21] Now called The Miami Beach Sun-Reporter Robert Swift, the editor at the time, is no longer associated with the paper. There are no current employees who were with the paper when the suit was filed. The paper was owned by Louis Wolfson at the time. We expect to receive the briefs used in argument before the Supreme Court of Florida shortly.

[22] § 286.011 Fla. Stats. (1971).

[23] Fla. Supp. 7 at 8. The Court had earlier denied defendant's motion to dismiss on the grounds that § 286.011 did not apply to municipalities. *See*, Op. Atty. Gen. 071–171 (1971) and § 1.01 Fla. Stats. (1971).

[24] *Id.* at 9. Attorney General Shevin will later condemn this very practice as one the law was designed to thwart. Op. Atty. Gen. 071–32 (1971).

[25] *Id.*

[26] *Id.* The defendants contended that primarily: a) land acquisitions or condemnations; b) personnel matters; and c) pending litigation were discussed at these sessions. Note the similarity to the Herrell bill, *see*, note 4, *supra*.

[27] *Id.*

[28] *Id.* Note the similar train of thought in 071–32, supra, note 24.

[29] *Id.*

[30] *Id.* at 10.

[31] *Eg.*, Gainesville Sun, editorial, January 26, 1969.

[32] *Id.*

[33] 222 So. 2d. 470 (2d D.C.A. Fla. 1969).

[34] Publishers of the St. Petersburg Times were Betty Orsini and Charles Patrick.

[35] *Id.* at 472. Compare these contentions with the allegations in the complaint in *Berns, supra. See also*, appellant's brief at 10.

[36] 222 So. 2d at 473. The Court then referred to *Walling* v. *Carlton*, 109 Fla. 97 147 So. 236 (1933) where "official act" was defined as: "any act done by the officer in his official capacity under color and by virtue of his office."

[37] 222 So. 2d at 473.

[38] *Id. See also*, appellant's brief at 25–6.

[39] *Id.*

[40] *Id.* at 474, *But see, Bassett v. Braddock, infra.*

[41] *Id.*

[42] *Id.* The Court stated that the public interest may not be served by closed door personnel hearings. "The public has chosen to deny any privilege or discretion in appellee and similar governmental bodies to conduct closed meetings."

[43] 222 So. 2d at 475. *See, Florida Bar v. Massfeller*, 170 So. 2d 834 (Fla. 1965).

[44] 222 So. 2d at 476.

[45] Id. The Court later receded from this position in *Bassett v. Braddock*, 262 So. 2d 425 (Fla. 1972).

[46] 225 So. 2d 693 (Fla. 1969), *reh. denied*, July 29, 1969. In the rehearing petition, school board attorney Shanleweiler contended that the court's decision "seems to be broader than the express language of the act itself", and that "it is difficult to conceive why the narrower sunshine law is given the broadest interpretation by the court." *See*, Tampa Tribune, July 30, 1969.

[47] 224 So. 2d at 696. "Items were passed by letter and number and it was impossible for the public to understand the items being considered."

[48] *Id.* at 698.

[49] The Court did imply that the statute does require a charge and proof of scienter even though it is not specified as a specific element of the offense.

[50] *Id.* at 699. The injunction was accordingly affirmed.

[51] Tampa Tribune August 3, 1969, referring to the *Williams* decision.

[52] *Id.* Paul Pickett, then Orange County Commission Chairman.

[53] *See* note 33.

[54] *But see Bassett* v. *Braddock*, 262 So. 2d 425 (Fla. 1972) abruptly reversing the snowballing trend established in these cases.

[55] Tampa Tribune, August 3, 1969.

[56] *Id.* Chairman Pickett was not happy about the Supreme Court Opinion, when informed by the County Attorney.

[57] *Id.* Whenever we have a quorum present we shall be open to the press and public: Supt. Ralph Staten.

[58] *Id.* "I believe that it should be the policy of the governor and all Cabinet members to take care that at such times as they are together, the press and public should have complete access to the meetings . . ." Letter to Governor Kirk, by Attorney General Earl Faircloth.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* One of the campaigning councilwomen said that, "It was my reason for running, and I feel the Sunshine Law has given us a little bit of backbone."
[64] *Id.* The two-party meeting was popularized by Orange County Commission Chairman Pickett. *See* note 60 and accompanying text.
[65] Pickett conceded that he may well be violating the intent if not the letter of the Court's order but he refused to put himself in a position of discussing charges against a county employee in public if they were unsubstantiated. *See* Op. Atty. Gen. 071-032 (1971).
[66] Two Broward County School Board employees resigned and threatened suit because of a critical remark made by a member of the Board.
[67] Tampa Tribune, August 3, 1969.
[68] *Canney* v. *Board of Public Instruction of Alachua County*, 231 So. 2d 34 (1 D.C.A. Fla. 1970) *reh. denied*, January 27, 1970.
[69] *Id.*
[70] *Id.* at 39.
[71] *Id.*
[72] Fla. const. art. V, § 4(2) (1968).
[73] *Times Publishing Company* v. *Williams*, 222 So. 2d 470, 474 (2d D.C.A. Fla. 1969), footnote 2.
[74] *Canney* v. *Board of Public Instruction of Alachua County*, 231 So. 2d 34 (1 D.C.A. Fla. 1970).
[75] The abrupt shift in terminology from quasi-judicial functions to judicial characteristics, is unexplained as well as unwarranted. It is this slip in terminological consistency that leads to the eventual result.
[76] *Canney* v. *Board of Public Instruction of Alachua County, supra.*
[77] *Id.*
[78] *Id.* It is this wording that lends credence to the belief that the decision is limited to school board dealing with students. *Bassett, infra*, broadened the interpretation in this reporter's opinion. I feel that the courts are carving out portions of a school board's activities because of the delicate nature of their work and the potential harm facing Florida's young, impressionable school children.
[79] 238 So. 2d 466 (3d D.C.A. Fla. 1970), *rehearing denied*, Sept. 30, 1970.
[80] The first vote resulted in a 2–2 deadlock, and the second vote, in open hearing approved the application 2–0, the balance of the quorum abstaining in accordance with the Board's rules. In accord with its own rules and general principles of administrative law, the Board continued the matter without further notice or public hearing. *See*, 2 Am. Jur. 2d, Admin. Law § 362.
[81] 238 So. 2d at 467.
[82] *Id.*
[83] *Id.* The Court cited all the cases discussed to this point.
[84] 245 So. 2d 38 (Fla. 1970), *on rehearing, original opinion withdrawn. See*, Tampa Tribune, October 8, 1970. The District Court of Appeal certified the case to the Florida Supreme Court as a question of great public interest.
[85] *Id.*
[86] 47 So. 2d 543 (Fla. 1950).
[87] 245 So. 2d at 40.
[88] *Id. See also Board of Public Instruction* v. *Doran*, 224 So. 2d 693, 698 (Fla. 1969), *supra.*
[89] 245 So. 2d at 40.
[90] *Id.*
[91] *Times Publishing Co.* v. *Williams*, 222 So. 2d 470 (2d D.C.A. Fla. 1969).
[92] *Board of Public Instruction of Broward County* v. *Doran*, 224 So. 2d 693 (Fla. 1969).
[93] 245 So. 2d at 41.
[94] *Id.*
[95] *Id.*
[96] *Id.*

[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Gainesville Sun, February 3, 1971, pg. 4.
[101] *Id.* at pg. 8
[102] *Id.*
[103] Gainsville Sun, February 8, 1971, pg. 15.
[104] *Id.*
[105] Tampa Tribune, February 8, 1971. It should be noted that Senator Askew voted for the Cross bill.
[106] Melbourne Times, March 19, 1971. pg. 3.
[107] *Id.*
[108] *Id.* at 4. The opinion actually uses the words "purposely secret." There is *no* invitation requirement. *See*, Op. Atty. Gen. 071–32 (March 1971).
[109] *Id.*
[110] *Id.*
[111] Gainesville Sun, March 6, 1971. pg. 6.
[112] *Id.*
[113] *Id.*
[114] Melbourne Times, March 19, 1971.
[115] *Id.* Commissioner Steele of Brevard County.
[116] Op. Atty. Gen. 071–58. (March 1971).
[117] *Id.* The opinion contains a warning against using the *nunc pro tunc* reenactment to avoid the effect of the law.
[118] Gainesville Sun. May 4, 1971. pg. 8.
[119] *Id.*
[120] *Id.*
[121] Gainesville Sun, May 7, 1971. pg. 7.
[122] *Id.*
[123] *Id.*
[124] Gainesville Sun, May 19, 1971. pg. 1.
[125] Op. Atty. Gen. 071–191 (July 1971).
[126] Op. Atty. Gen. 071–159 (June 1971).
[127] Gainesville Sun, November 9, 1971. pg. 3.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Op. Atty. Gen. 071–361 (November 1971).
[132] Op. Atty. Gen. 071–380 (December 1971).
[133] Op. Atty. Gen. 072–16 (January 1972).
[134] Gainesville Sun, February 9, 1972. Jerry Thomas co-sponsored the bill in 1967. He felt that if he was correct then the law should be amended to include legislators, "but only if it strictly spelled out what specific functions were excluded."
[135] 262 So. 2d 425 (Fla. 1972).
[136] *Id.* at 476.
[137] *Id.*
[138] *Id.*
[139] *Id.* at 427.
[140] Ap. Atty. Gen. 071–32A (July 1971).
[141] *Bassett v. Braddock*, 262 So. 2d 425, at 427.
[142] *Id.* at 429.
[143] *Id.* at 430.
[144] One hour interview with Senator Cross at his Gainesville office, July 7, 1972.

93D CONGRESS
1ST SESSION

S. 260

IN THE SENATE OF THE UNITED STATES

JANUARY 9, 1973

Mr. CHILES (for himself, Mr. CLARK, Mr. COOK, Mr. CRANSTON, Mr. GURNEY, Mr. HART, Mr. HATFIELD, Mr. HUMPHREY, Mr. MATHIAS, Mr. METCALF, Mr. MONDALE, Mr. NELSON, Mr. PACKWOOD, Mr. PROXMIRE, Mr. ROTH, Mr. STAFFORD, Mr. STEVENSON, Mr. TUNNEY, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.—This Act may be cited as the "Government in the Sunshine Act".

SEC. 2. DECLARATION OF POLICY.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.

SEC. 3. DEFINITIONS.—For purposes of this Act—

(1) "National security" means—

(A) the protection of the United States against actual or potential attack or other hostile acts of a foreign power;

(B) the obtaining of foreign intelligence information deemed essential to the security of the United States;

(C) the protection of national security information against foreign intelligence activities; or

(D) the protection, to the extent deemed necessary by the President of the United States against the overthrow of the Government by force; and

(2) "Person" includes an individual, partnership, corporation, associated governmental authority, or public or private organization.

TITLE I—CONGRESSIONAL PROCEDURES

SEC. 101. SENATE COMMITTEE HEARING PROCEDURE.—(a) The Legislative Reorganization Act of 1946 is amended—

(1) by striking out the third sentence of section 133(b);

(2) by striking out subsections (a), (b), and (f) of section 133A;

(3) by adding after section 133B the following:

"OPEN SENATE COMMITTEE MEETINGS

"SEC. 133C. (a) Each meeting of each standing, select, or special committee or subcommittee of the Senate, including meetings to conduct hearings, shall be open to the public: *Provided,* That a portion or portions of such meetings may be closed to the public if the committee or subcommittee, as the case may be, determines by vote of a majority of the members of the committee present that the matters to be discussed or the testimony to be taken at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national security or the confidential conduct of the foreign relations of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge with crime or misconduct, or to disgrace, injure the professional standing or otherwise expose to public contempt or obloquy any individual, or will represent a clearly unwarranted invasion of the privacy of any individual: *Provided,* That this subsection shall not apply to any government officer or employee with respect to his official duties or employment: *And provided further,* That as applied to a witness at a meeting to conduct a hearing, this subsection

shall not apply unless the witness requests in writing that the hearing be closed to the public;

"(4) will disclose the identity of any informer or law enforcement agent or of any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person where—

"(A) the information has been obtained by the Federal Government on a confidential basis other than through an application by such person for a specific government financial or other benefit; and

"(B) Federal statute requires the information to be kept confidential by Government officers and employees; and

"(C) the information is required to be kept secret in order to prevent undue injury to the competitive position of such person.

A separate vote of the committee shall be taken with respect to each committee or subcommittee meeting that is closed to the public pursuant to this subsection, and the committee shall make available within one day of such

meeting, a written explanation of its action. The vote of each committee member participating in each such vote shall be recorded and published and no proxies shall be allowed.

"(b) Each standing, select, or special committee or subcommittee of the Senate shall make public announcement of the date, place, and subject matter of each meeting (whether open or closed to the public) at least one week before such meeting unless the committee or subcommittee determines by a vote of the majority of its members that committee business requires that such meeting be called at an earlier date, in which case the committee shall make public announcement of the date, place and subject matter of such meeting at the earliest practicable opportunity.

"(c) A complete transcript, including a list of all persons attending and their affiliation, shall be made of each meeting of each standing, select, or special committee or subcommittee (whether open or closed to the public). Except as provided in subsection (d) of this section, a copy of each such transcript shall be made available for public inspection within seven days of each such meeting, and additional copies of any transcript shall be furnished to any person at the actual cost of duplication.

"(d) In the case of meetings closed to the public pursuant to subsection (a) of this section, the committee or sub-

committee may delete from the copies of transcripts that are required to be made available or furnished to the public pursuant to subsection (c) of this section, those portions which it determines by vote of the majority of the committee or subcommittee consist of materials specified in paragraph (1), (2), (3), (4), or (5) of subsection (a) of this section. A separate vote of the committee or subcommittee shall be taken with respect to each such transcript. The vote of each committee or subcommittee member participating in each such vote shall be recorded and published, and no proxies shall be allowed. In place of each portion deleted from copies of the transcript made available to the public, the committee or subcommittee shall supply a written explanation of why such portion was deleted, and a summary of the substance of the deleted portion that does not itself disclose information specified in paragraphs (1), (2), (3), (4), (5) of subsection (a). The committee or subcommittee shall maintain a complete copy of the transcript of each meeting (including those portions deleted from copies made available to the public), for a period of at least one year after such meeting.

"(e) A point of order may be raised in the Senate against any committee vote to close a meeting to the public pursuant to subsection (a) of this section, or against any committee or subcommittee vote to delete from the publicly

available copy a portion of a meeting transcript pursuant to subsection (d) of this section, by committee or subcommittee members comprising one-fourth or more of the total membership of the entire committee or subcommittee, as the case may be. Any such point of order shall be raised in the Senate within five legislative days after the vote against which the point of order is raised, and such point of order shall be a matter of highest personal privilege. Each such point of order shall immediately be referred to a Select Committee on Meetings consisting of the President pro tempore, the leader of the majority party, and the leader of the minority party. The select committee shall examine the complete verbatim transcript of the meeting in question and shall rule whether the vote to close the meeting was in accordance with subsection (a) of this section, or whether the vote to delete a portion or portions from publicly available copies of the meeting transcript was in accordance with subsection (d) of this section, as the case may be. The select committee should report to the Senate within five calendar days (excluding days where the Senate is not in session) a resolution containing its findings. If the Senate adopts a resolution finding that the committee vote in question was not in accordance with the relevant subsection, it shall direct that there be made publicly available the entire transcript of the meeting improp-

erly closed to the public or the portion or portions of any meeting transcript improperly deleted from the publicly available copy, as the case may be.

"(f) The Select Committee on Meetings shall not be subject to the provisions of subsection (a), (b), (c), or (d) of this section."

(b) Subsection (a) of subsection 242 of the Legislative Reorganization Act of 1970 is repealed.

(c) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133B the following:

"133C. Open senate committee meetings.".

SEC. 102. Clause 27 (f) (2) of rule XI of the Rules of the House of Representatives is amended to read as follows:

"(2) (A) Each meeting of each standing, select, or special committee or subcommittee, including meetings to conduct hearings, shall be open to the public: *Provided,* That a portion or portions of such meetings may be closed to the public if the committee or subcommittee, as the case may be, determines by vote of a majority of the members committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—

"(i) will probably disclose matters necessary to be kept secret in the interests of national security or the con-

fidential conduct of the foreign relations of the United States;

"(ii) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(iii) will tend to charge with crime or misconduct, or to disgrace, injure the professional standing or otherwise expose to public contempt of obloquy any individual, or will represent a clearly unwarranted invasion of the privacy of any individual: *Provided,* That this subsection shall not apply to any government or officer or employee with respect to his official duties or employment: *And provided further,* That as applied to a witness at a meeting to conduct a hearing, this subsection shall not apply unless the witness requests in writing that the hearing be closed to the public;

"(iv) will probably disclose the identity of any informer or law enforcement agent or of any information relating to the investigation or presecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement; or

"(v) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person where—

"(I) the information has been obtained by the

Federal Government on a confidential basis other than through an application by such person for a specific government financial or other benefit;

"(II) Federal statute requires the information to be kept confidential by Government officers and employees, and

"(III) the information is required to be kept secret in order to prevent undue injury to the competitive position of such persons.

A separate vote of the committee shall be taken with respect to each committee or subcommittee meeting that is closed to the public pursuant to this subsection, and the committee shall make available within one day of such meeting, a written explanation of its action. The vote of each committee member participating in each such vote shall be recorded and published and no proxies shall be allowed.

"(B) Each standing, select, or special committee or subcommittee shall make public announcement of the date, place, and subject matter of each meeting (whether open or closed to the public) at least one week before such meeting unless the committee or subcommittee determines that committee business requires that such meeting be called at an earlier date, in which case the committee shall make public announcement of the date, place, and subject matter of such meeting at the earliest practicable opportunity.

"(C) A complete transcript, including a list of all persons attending and their affiliation, shall be made of each meeting of each standing, select, or special committee or subcommittee meeting (whether open or closed to the public). Except as provided in paragraph (D), a copy of each such transcript shall be made available for public inspection within seven days of each such meeting, and additional copies of any transcript shall be furnished to any person at the actual cost of duplication.

"(D) In the case of meetings closed to the public pursuant to subparagraph (A), the committee or subcommittee may delete from the copies of transcripts that are required to be made available or furnished to the public pursuant to subparagraph (C), portions which it determines by vote of the majority of the committee or subcommittee consist of material specified in clauses (i), (ii), (iii), (iv), or (v) of subparagraph (A). A separate vote of the committee or subcommittee shall be taken with respect to each transcript. The vote of each committee or subcommittee member participating in each such vote shall be recorded and published, and no proxies shall be allowed. In place of each portion deleted from copies of the transcript made available to the public, the committee shall supply a written explanation of why such portion was deleted and a summary of the substance of the deleted portion that does not itself dis-

close information specified in subsection (i), (ii), (iii), (iv), or (v) of subsection (a). The committee or subcommittee shall maintain a complete copy of the transcript of each meeting (including those portions deleted from copies made available to the public), for a period of at least one year after such meetings.

"(E) A point of order may be raised against any committee or subcommittee vote to close a meeting to the public pursuant to subparagraph (A), or against any committee or subcommittee vote to delete from the publicly available copy a portion of a meeting transcript and pursuant to subparagraph (D), by committee or subcommittee members comprising one-fourth or more of the total membership of the entire committee or subcommittee. Any such point of order must be raised before the entire House within five legislative days after the vote against which the point of order is raised, and such point of order shall be a matter of highest privilege. Each such point of order shall immediately be referred to a Select Committee on Meetings consisting of the Speaker of the House of Representatives, the majority leader, and the minority leader. The select committee shall report to the House within five calendar days (excluding days where the House is not in session) a resolution containing its findings. If the House adopts a resolution finding that the committee vote in question was not in accord-

ance with the relevant subsection, it shall direct that there be made publicly available the entire transcript of the meeting improperly closed to the public or the portion or portions of any meeting transcript improperly deleted from the publicly available copy.

"(F) The Select Committee on Meetings shall not be subject to the provisions of subparagraph (A), (B), (C), or (D)."

SEC. 103. CONFERENCE COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133(c), as added by section 101(3) of this Act the following new section:

"OPEN CONFERENCE COMMITTEE MEETINGS

"SEC. 133D. (a) Each meeting of a committee of conference shall be open to the public: *Provided,* That a portion or portions of such meetings may be closed to the public if the committee determines by vote of a majority of the members of the committee present that the matters to be discussed or the testimony to be taken at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national security or the confidential conduct of the foreign relations of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge with crime or misconduct,

or to disgrace, injure the professional standing or otherwise expose to public contempt or obloquy any individual, or will represent a clearly unwarranted invasion of the privacy of any individual: *Provided,* That this subsection shall not apply to any government or officer or employee with respect to his official duties or employment: *And, provided further,* That as applied to a witness at a meeting to conduct a hearing, this subsection shall not apply unless the witness requests in writing that the hearing be closed to the public;

"(4) will disclose the identity of any informer or law enforcement agent or of any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person where—

"(A) the information has been obtained by the Federal Government on a confidential basis other than through an application by such person for a specific government financial or other benefit;

"(B) Federal statute requires the information to be kept confidential by Government officers and employees; and

"(C) the information is required to be kept secret in order to prevent undue injury to the competitive position of such persons.

A separate vote of the committee shall be taken with respect to each meeting that is closed to the public pursuant to this subsection, and the committee shall make available within one day of such meeting, a written explanation of its action. The vote of each committee member participating in each such vote shall be recorded and published and no proxies shall be allowed.

"(b) Each committee of conference shall make public announcement of the date, place, and subject matter of such meeting at the earliest practicable opportunity.

"(c) A complete transcript, including a list of all persons attending and their affiliation, shall be made of each meeting of each committee of conference (whether open or closed to the public). Except as provided in subsection (d) of this section, a copy of each such transcript shall be made available for public inspection within seven days of each such meeting, and additional copies of any transcript shall be furnished to any person at the actual cost of duplication.

"(d) In the case of meetings closed to the public pursuant to subsection (a) of this section, the committee of conference may delete from the copies of transcripts that are required to be made available or furnished to the public pur-

suant to subsection (c) of this section, those portions which it determines by vote of the majority of the committee consist of materials specified in paragraph (1), (2), (3), (4), or (5) of subsection (a) of this section. A separate vote of the committee shall be taken with respect to each such transcript. The vote of each committee member participating in each such vote shall be recorded and published, and no proxies shall be allowed. In place of each portion deleted from copies of the transcript made available to the public, the committee shall supply a written explanation of why such portion was deleted, and a summary of the substance of the deleted portion that does not itself disclose information specified in paragraph (1), (2), (3), (4), or (5) of subsection (a) of this section. The committee shall maintain a complete copy of the transcript of each meeting (including those portions deleted from copies made available to the public), for a period of at least one year after such meeting.

"(e) A point of order may be raised against any committee vote of a committee of conference to close a meeting to the public pursuant to subsection (a) of this section or any committee vote to delete from the publicly available copy a portion of a meeting transcript pursuant to subsection (d) of this section by committee members comprising one-fourth or more of the total membership of the entire committee. Any such point of order shall be raised in

either House within five legislative days after the vote against which the point of order is raised, and such point of order shall be a matter of highest personal privilege. Each such point of order shall immediately be referred to a Select Conference Committee on Meetings consisting of the President pro tempore of the Senate, the Speaker of the House of Representatives, and the majority and minority leaders from each House. The select committee shall examine the complete verbatim transcript of the meeting in question and shall rule whether the vote to close the meeting was in accordance with subsection (a) of this section or whether the vote to delete a portion or portions from publicly available copies of the meeting transcript was in accordance with subsection (d) of this section, as the case may be. The select committee reports to both Houses a concurrent resolution within five calendar days (excluding days where either House is not in session) a resolution containing its findings. If both Houses adopt such a resolution finding that the committee vote in question was not in accordance with the relevant subsection, they shall direct that there be made publicly available the entire transcript of the meeting improperly closed to the public or the portion or portions of any meeting transcript improperly deleted from the publicly available copy, as the case may be.

"(f) The Select Conference Committee on Meetings

shall not be subject to the provisions of subsection (a), (b), (c), or (d) of this section."

(b) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133C, as added by section 101 (c) of this Act, the following:

"133D. Open conference committee meetings.".

TITLE II—AGENCY PROCEDURES

SEC. 201. (a) This section applies, according to the provisions thereof, to any agency, as defined in section 551 (1) of title 5, United States Code, where the body comprising the agency consists of two or more members. Except as provided in subsection (b), all meetings (including meetings to conduct hearings) of such agencies at which official action is considered or discussed shall be open to the public.

(b) Subsection (a) shall not apply to any portion or portions of an agency meeting where the agency determines by vote of a majority of its entire membership—

(1) will probably disclose matters necessary to be kept secret in the interests of national security or the confidential conduct of the foreign relations of the United States;

(2) will relate solely to individual agency personnel or to internal agency office management and procedures or financial auditing;

(3) will tend to charge with crime or misconduct, or to disgrace, injure the professional standing or otherwise expose to public contempt of obloquy any individual, or will represent a clearly unwarranted invasion of the privacy of any individual: *Provided,* That this subsection shall not apply to any government or officer or employee with respect to his official duties or employment: *And provided further,* That as applied to a witness at a meeting to conduct a hearing, this subsection shall not apply unless the witness requests in writing that the hearing be closed to the public;

(4) will probably disclose the identity of any informer or law enforcement agent or of any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement;

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person where—

(A) the information has been obtained by the Federal Government on a confidential basis other than through an application by such person for a specific government financial or other benefit; and

(B) Federal statute requires the information to

be kept confidential by government officers and employees, and

(C) the information is required to be kept secret in order to prevent undue injury to the competitive position of such persons;

(6) will relate to the conduct or disposition (but not the initiation of a case of adjudication governed by the provisions of the first paragraph of section 554(a) of title 5, United States Code, or of subsection (1), (2), (4), (5), or (6) thereof.

A separate vote of the agency members shall be taken with respect to each agency meeting that is closed to the public pursuant to this subsection. The vote of each agency member participating in such vote shall be recorded and published and no proxies shall be allowed. In the case of any closing of portions of a meeting to the public pursuant to this subsection, the agency shall promptly publish an explanation of its action.

(c) Each agency shall make public announcement of the date, place, and subject matter of each meeting at which official action is considered or discussed (whether open or closed to the public) at least one week before each meeting unless the agency determines by a vote of the majority of its members that agency business requires that such meetings be called at an earlier date, in which case the agency shall

make public announcement of the date, place, and subject matter of such meeting at the earliest practicable opportunity.

(d) A complete transcript, including a list of all persons attending and their affiliations, shall be made of each meeting of each agency at which official action is considered or discussed (whether open or closed to the public). Except as provided in subsection (e) of this section a copy of each such meeting shall be made available to the public for inspection, and additional copies of any transcript shall be furnished to any person at the actual cost of duplication.

(e) In the case of meetings closed to the public pursuant to subsection (b) of this section, the agency may delete from the copies of transcripts made available or furnished to the public pursuant to subsection (d) of this section those portions, which the agency determines by vote of a majority of its membership consists of materials specified in paragraph (1), (2), (3), (4), or (5) of subsection (b) of this section. A separate vote of the agency shall be taken with respect to each transcript. The vote of each agency member participating in such vote shall be recorded and published, and no proxies shall be allowed. In place of each portion deleted from copies of the meeting transcript made available to the public, the agency shall supply a written explanation of why such portion was deleted and a summary

of the substance of the deleted portion that does not itself disclose information specified in paragraph (1), (2), (3), (4), or (5) of subsection (a). The agency shall maintain a complete verbatim copy of the transcript of each meeting (including those portions deleted from copies made available to the public) for a period of at least two years after such meeting.

(f) Each agency subject to the requirements of this section shall, within one hundred and eighty days after the enactment of this Act, following published notice in the Federal Register of at least thirty days and opportunity for written comment by interested persons, promulgate regulations to implement the requirements of subsections (a) through (e) inclusive of this section. Any citizen or person resident in the United States may bring a proceeding in the United States Court of Appeals for the District of Columbia Circuit—

(1) to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein; or

(2) to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (a) through (e) of this section inclusive, and to require the promulgation of regulations that are in accord with such subsections.

(g) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (a) through (e) inclusive of this section by declaratory judgment, injunctive relief, or otherwise. Such actions may be brought by any citizen or person resident in the United States. Such actions shall be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In deciding such cases the court may examine any portion of a meeting transcript that was deleted from the publicly available copy. Among other forms of equitable relief, the court may require that any portion of a meeting transcript improperly deleted from the publicly available copy be made publicly available for inspection and copying, and, having due regard for orderly administration and the public interest, may set aside any agency action taken or discussed at an agency meeting improperly closed to the public.

(h) In any action brought pursuant to subsection (f) or (g) of this section, costs of litigation (including reasonable attorney's and expert witness fees) may be apportioned to the original parties or their successors in interest whenever the court determines such award is appropriate.

(i) The agencies subject to the requirements of this section shall annually report to Congress regarding their compliance with such requirements, including a tabulation

of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section.

SEC. 202. (a) Title 5 of the United States Code is amended by adding after section 557 the following:

"EX PARTE COMMUNICATIONS IN AGENCY PROCEEDING

"SEC. 557. (a) This section applies, according to the provisions thereof, to the following proceedings:

"(1) any proceeding to which section 557(a) of this title applies;

"(2) any rulemaking proceeding with respect to which an agency is required by section 553 of this title to afford public notice and opportunity for participation by interested persons: *Provided*, That for purposes of this section the exemption from such requirements in section 553(a)(2) of matters relating to public property, loans, grants, benefits, or contracts shall not be effective; or

"(3) any proceeding to prepare an environmental impact statement required by section 102(2)(c) of the National Environmental Policy Act.

"(b) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required

for the disposition of ex parte matters as authorized by law—

"(1) no interested person (including members or employees of other government agencies) shall make or cause to be made to any member of the agency in question, hearing examiner, or employee who is or may be involved in the decisional process of said proceeding, an ex parte communication relevant to the events of the proceeding;

"(2) no member of the agency in question, hearing examiner, or employee who is or may be involved in the decisional process of such proceeding, shall make or cause to be made to an interested person an ex parte communication relevant to the merits of the proceeding;

"(3) a member of the agency in question, hearing examiner, or employee who is or may be involved in the decisional process of said proceeding, who receives a communication in violation of this subsection shall place in the public record of the proceeding—

"(A) written material submitted in violation of this subsection; or

"(B) memorandums stating the substance of all oral communications submitted in violation of this subsection; or

"(C) responses to the materials described in subparagraphs (A) and (B) of this subsection;

"(4) upon receipt of a communication in violation of this subsection from a party to any proceeding to which this section applies, the hearing examiner or employee presiding at the hearings may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the persons or party to show cause why his claim or interest in the proceeding should not be discussed, denied, disregarded, or otherwise adversely affected by virtue of such violation; and

"(5) the prohibitions of this subsection shall apply at such time as the agency shall designate, having due regard for the public interest in open decisionmaking by agencies, but in no case shall they apply later than the time at which a proceeding is noticed for hearing or opportunity for participation by interested persons unless the person is responsible for the communication has knowledge that it will be noticed, in which case said prohibition shall apply at the time of his acquisition of such knowledge.

"(c) Each agency subject to the requirements of this section shall, within one hundred and eighty days after the enactment of this section, following published notice in the Federal Register of at least thirty days and opportu-

nity for written comment by interested persons, promulgate regulations to implement the requirements of subsection (b) of this section. Any citizen or person resident in the United States may bring a proceeding in the United States Court of Appeals for the District of Columbia Circuit—

"(1) to require any agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein;

"(2) to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsection (b) of this section; and to require the promulgation of regulations that are in accord with such subsection.

"(d) The district courts of the United States shall have jurisdiction to enforce the requirements of subsection (b) of this section by declaratory judgment, injunctive relief, or otherwise. Such action may be brought by any citizen of or person resident in the United States. Such actions shall be brought in the district wherein the plaintiff resides or has his principal place of business or where the agency in question has its headquarters. Where a person other than an agency, agency member, hearing examiner, or employee is alleged to have participated in a violation of the requirements of subsection (b) of this section such person may, but need not be joined with the agency as a party defendant; for purposes

of joining such person as a party defendant, service may be had on such person in any district. Among other forms of equitable relief, the court may require that any ex parte communication made or received in violation of the requirements of subsection (b) of this section be published, and, having due regard for orderly administration and the public interest, may set aside any agency action taken in a proceeding with respect to which the violation occurred.

"(e) In any action brought pursuant to subsection (c) or (d) of this subsection, cost of litigation (including reasonable attorney's and expert witness fees) may be apportioned to the original parties or their successors in interest whenever the court determines such award is appropriate."

SEC. 203. This title and the amendments made by this title do not authorize withholding of information or limit the availability of records to the public except as provided in this title. This title is not to be construed as authority to withhold information from Congress.

The following letter on title I of S. 260 was sent to various organizations and experts in the field of legislative procedure in July 1973 setting forth specific questions for consideration. Their replies follow this letter.

DEAR SIR: Enclosed is a copy of S. 260, the Federal "Government in the Sunshine Act", of which Senator Lawton Chiles is the chief sponsor and which has been referred to the Subcommittee on Reorganization, Research, and International Organizations for consideration. The bill requires that all meetings of congressional committees and multimember Federal agencies be open to the public, except under certain exemptions.

As the subcommittee is planning to hold hearings in the near future, we want to receive a wide range of opinions concerning this legislation. We would therefore appreciate receiving your views and comments on the provisions of this bill. Specifically, we would like your opinions on the following questions included in your analysis.

QUESTIONS CONCERNING OPEN CONGRESSIONAL COMMITTEE MEETINGS

At present, the rules of the House of Representatives provide that committee meetings shall be open to the public unless a majority of the committee votes to close an individual meeting. The Senate rules provide that a committee may conduct meetings in public if they choose to do so. Several Senate committees have adopted rules providing that meetings of the committee shall be open unless the committee votes otherwise.

1. Do you favor the approach of the House or Senate rules—i.e., should committee meetings be presumptively open unless the committee otherwise provides, or should they be presumptively closed? Why?

2. Will an open meeting requirement impair the quality or speed of legislative decisionmaking? How will the relation between Congress and the media or organized interest groups be affected by such a requirement?

3. S. 260 attempts to limit the grounds, such as national security, on which a committee may properly vote to close a meeting. Do you think it wise to attempt to specify in a statute permissible exemptions from an open meeting requirement or should the decision to close a meeting be left to the discretion of one committee in question? If it is desirable to specify exemptions, do you think that the exemptions provided in S. 260 are sound? Are they too narrow? Too broad?

4. S. 260 provides a method for enforcing the open meeting requirement by creating a Select Committee on Meetings to which would be referred points of order against meetings claimed to be improperly closed provided that the point of order is raised by one-quarter of the members of the committee in question. Do you think that this is a

sound and workable procedure? What alternative enforcement procedure, if any, would you recommend?

Your assistance in this matter will be greatly valued by the Subcommittee. We look forward to hearing from you.

Sincerely,

ABE RIBICOFF.
LAWTON CHILES.

STATE OF FLORIDA,
November 5, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR LAWTON: Thank you for your letter enclosing S. 260, the "Government in the Sunshine Act." I am proud of the leadership you are providing on this fundamental issue.

I have reviewed the legislation and wholeheartedly support and endorse it. My opinion is that exceptions should be as few and as tightly worded as possible.

I appreciate the difficulty and complexity of this issue and believe that S. 260 as drafted would be a dramatic forward step in improving government. My opinion is that the public's right to know outweighs the need for unjustified secrecy.

With kind personal regards,

Sincerely,

REUBIN O'D. ASKEW,
Governor.

HOUSE OF REPRESENTATIVES,
COMMONWEALTH OF PENNSYLVANIA,
Harrisburg, Pa., September 12, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: Thank you for the copy of S. 260, "Government in the Sunshine Act."

As we in Pennsylvania have recently passed similar legislation, I think you may find an address I recently presented to the 1973 Eastern Regional Conference of the Council of State Governments, helpful to your Subcommittee. The majority of my views are expressed in the text.

I am also enclosing a copy of House Bill 124 which was recently introduced in the Pennsylvania House of Representatives for your information.

If I can be of further assistance to you at anytime, please do not hesitate to contact me.

Very truly yours,

ROBERT J. BUTERA.
Majority Leader.

PRIOR PRINTER'S NOS. 144, 951 **Printer's No.** 1638

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 124 Session of 1973

INTRODUCED BY MESSRS. KNEPPER, M. E. MILLER, BUTERA, TURNER, SCIRICA, BERKES, HOPKINS, WISE, SHANE, HASKELL, R. W. WILT AND FISCHER, JANUARY 23, 1973

AS AMENDED ON THIRD CONSIDERATION, HOUSE OF REPRESENTATIVES, JULY 25, 1973

AN ACT

~~Requiring public agencies to hold certain meetings and hearings~~ <-- REQUIRING PUBLIC AGENCIES TO HOLD CERTAIN MEETINGS AND HEARINGS <-- open to the public and providing penalties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. As used in this act:

~~"Agency" means any department, board, authority or commission of the Commonwealth of Pennsylvania, any political subdivision~~ <--

"AGENCY" MEANS ANY DEPARTMENT, BOARD, AUTHORITY OR COMMISSION <-- OF THE COMMONWEALTH OF PENNSYLVANIA EXCLUDING THE GENERAL ASSEMBLY AND THE JUDICIAL DEPARTMENT, ANY POLITICAL SUBDIVISION of the Commonwealth, or any State, municipal, township or school authority, school board, school governing body, commission, or similar organization created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function.

"FORMAL ACTION" MEANS THE TAKING OF ANY VOTE ON ANY <--

RESOLUTION, RULE, ORDER, MOTION, REGULATION OR ORDINANCE OR THE TAKING OF ANY MINUTES REQUIRED BY LAW.

~~Section 2. The meetings or hearings of every agency at which official discussions and voting are scheduled, or taken, are public meetings, open to the public at all times. No formal action, resolution, rule, regulation or ordinance shall be valid unless all voting is held during a public meeting. Nor shall any formal action, resolution, rule, regulation or ordinance be valid if public petition or discussion is requested and refused. If granted, however, the petition shall be presented and discussion shall be had during a recess of the meeting of the agency, as the case may be; and minutes shall be taken by the secretary or a certified public stenographer as shall be determined by the agency. The length of the recess for the purpose of petition and discussion shall be fixed by the agency and may be extended should a majority of the agency deem it necessary or appropriate. In addition, the recess for the purpose of petition and discussion may be adjourned, for the purpose of extended discussion, to a time and place, respectively, within the political subdivision that is, in the judgment of the agency, appropriate to the purpose. It is further provided that upon conclusion or adjournment of the recess that the agency shall reconvene for the purpose of the official business of the agency and that said petitioners or discussants shall in no wise further participate in the official discussions or deliberations of the agency. The presiding officer of the agency shall enforce this provision and is herewith empowered to have any person or persons in violation removed from said meeting that the official business of the agency may proceed with order and decorum.~~ <--

~~Section 3. Executive sessions of the agency may be held for the purpose of unofficial discussion; however, no public meeting of any agency shall be adjourned, recessed or interrupted in any way for purposes of executive or closed session at which an official vote is taken.~~

SECTION 2. THE MEETINGS OR HEARINGS OF EVERY AGENCY AT WHICH <-- FORMAL ACTION IS SCHEDULED OR TAKEN ARE PUBLIC MEETINGS AND SHALL BE OPEN TO THE PUBLIC AT ALL TIMES. NO FORMAL ACTION SHALL BE VALID UNLESS SUCH FORMAL ACTION IS TAKEN DURING A PUBLIC MEETING; NOR SHALL ANY FORMAL ACTION BE VALID IF REASONABLE PUBLIC DISCUSSION IS REQUESTED AND REFUSED.

SECTION 3. NO PUBLIC MEETING OF ANY AGENCY SHALL BE ADJOURNED, BEGUN, RECESSED OR INTERRUPTED IN ANY WAY FOR THE PURPOSE OF AN EXECUTIVE SESSION. THIS SECTION SHALL NOT BE INTENDED TO PROHIBIT EXECUTIVE SESSIONS: PROVIDED, THAT NO FORMAL ACTION BE TAKEN DURING SUCH EXECUTIVE SESSIONS.

Section 4. The minutes of a public meeting of an agency shall be taken and promptly recorded and shall be a public record under and subject to the act of June 21, 1957 (P.L.390, No.212), entitled "An act requiring certain records of the Commonwealth and its political subdivisions and of certain authorities and other agencies performing essential governmental functions, to be open for examination and inspection by citizens of the Commonwealth of Pennsylvania; authorizing such citizens under certain conditions to make extracts, copies, photographs or photostats of such records; and providing for appeals to the courts of common pleas."

Section 5. (a) Every agency shall hold all public meetings at specified times and places of which public notice shall be given.

(b) Public notice of the schedule of regular meetings shall be given once for each calendar or fiscal year, and shall show the regular dates and times for meetings and the place at which meetings are held. Public notice of each special meeting or hearing and of each rescheduled regular or special meeting or hearing shall be given of the date, time and place of each meeting as the case may be. Public notice shall be given (i) by publishing the notice once in a newspaper of general circulation, as defined by the act of May 16, 1929 (P.L.1784, No.587), known as the "Newspaper Advertising Act," which is published and circulated in the political subdivision where the meeting or hearing will be held, or such newspaper of general circulation which has a bona fide paid circulation equal to or greater than any newspaper published in the said political subdivision; (ii) and by posting a copy of the notice prominently at the principal office of the agency holding the meeting or at the public building in which the meeting is to be held.

(c) Public notice shall be given at least three days prior to the time of the first regularly scheduled meeting in the case of regular meetings, and at least twenty-four hours prior to the time of the meeting in the case of special or rescheduled meetings or hearings.

(d) Publication in the legal periodical in the county shall not be required. The agency holding any meeting shall supply, on request, copies of the public notice thereof to any newspaper of general circulation in the political subdivision in which the meeting will be held and to any radio and television station which regularly broadcasts into the political subdivision.

Section 6. Any member of any agency who ~~attends any meeting~~ <--

PARTICIPATES IN A MEETING OR HEARING KNOWING THAT IT IS BEING HELD OR CONDUCTED with the intent and purpose of violating this act is guilty of a ~~misdemeanor~~ SUMMARY OFFENSE and upon conviction thereof shall be sentenced to pay a fine not exceeding one hundred dollars ($100) or to imprisonment for not more than thirty days, or both, plus costs of prosecution. <--

Section 7. The COMMONWEALTH COURT SHALL HAVE ORIGINAL JURISDICTION OF ACTIONS INVOLVING STATE AGENCIES AND THE courts of common pleas shall have original jurisdiction of actions INVOLVING OTHER AGENCIES to render declaratory judgments or to enforce this act, by injunction or other remedy deemed appropriate by the court. The action may be brought by any person in the judicial district where such person resides or has his principal place of business, where the agency whose act is complained of is located or where the act complained of occurred. <--

Section 8. All acts and parts of acts are repealed in so far as they are inconsistent herewith, EXCEPTING THOSE STATUTES WHICH SPECIFICALLY PROVIDE FOR THE CONFIDENTIALITY OF INFORMATION. <--

Section 9. This act shall take effect ~~immediately.~~ IN SIXTY DAYS. <--

24-589 68

THE COUNCIL OF STATE GOVERNMENTS 1973 EASTERN REGIONAL CONFERENCE—OPEN LEGISLATIVE COMMITTEES: THE PENNSYLVANIA EXPERIENCE

(By Robert J. Butera, Majority Leader, Pennsylvania House of Representatives)

Early in the 19th Century, Thomas Jefferson suggested that legislators should "Enlighten the people generally, and tyranny and oppression of body and mind will vanish like evil spirits at the dawn of day".

This principle of informing people was a basic principle in the creation of both the United States Congress and the state legislatures throughout the country.

Since then, Jefferson's motto has been too often followed in the breach rather than the execution. Secret meetings and complex parlimentary maneuvers designed to mislead the public have become an unwelcome part of the American legislative process.

Pennsylvania has been no exception. Although the House of Representatives and the Senate meet openly in the gracious legislative halls of our capitol, the art of politicing too often has been refined in the secret committee chambers and the private offices of our legislative leaders.

In particular, the committee system has, until this year, been a closed series of secret conferences dominated by a few powerful leaders. Before 1973, neither the press nor interested members of the general public had been allowed to listen in on the deliberations of the committee membership.

Consequently, the committee process was often a mockery of the democratic process. A bill could be brought out of committee at the whim of a chairman. Special interests, the Governor or powerful members of the House often determined whether a bill should be altered or even reported for a floor vote.

While keeping the committees closed may have served the interests of certain individuals or groups within the state, the practice in Pennsylvania was creating some serious problems which threatened the ability of the institution to perform in a meaningful manner.

For one thing, public mistrust and criticism of the legislature had grown to serious proportions. Time and again, my own mail as a legislator, was filled with letters from constituents who felt we were incapable of doing a good job. It was pointed out, with reason, that the 203 members of the House constituted an unwieldly body that did not know what is was doing. TV reports, editorial writers as well as irate voters were increasing their attacks on the legislature to the point where a continuance of the old policy had become untenable.

Much of this dissatisfaction arose from the fact that the committee system, by being closed, was not performing the necessary functions it was created for. A limited number of individuals were controlling the whole legislative process. The committee system had disintegrated to a point where the House had become a committee of the whole. Lacking a sub-structure, the institution was deserving much of the criticism leveled at it.

With this limited participation taking place in the scrutiny of bills in the committees, legislation arriving on the floor was often shoddy and incomplete. This means that serious debate would fall victim to an endless wrangling over details which should have been worked out by a committee meeting separately.

Like a Pandora's Box, there were other debilitative effects on the institution. For example, the morale of individual legislators was constantly being lowered by their inability to participate in the creation of legislation. Attendance at committee meetings was naturally low. A large wasteland of talented and frustrated legislators existed as individuals felt their input into the process was negligible. This in turn was extremely disappointing to members of the leadership when they realized that the legislature as a whole was not equal to the sum of its parts.

By the time I became the Majority Leader in the House, the threat of open revolt against the traditional way of doing business was in the air. New legislators arriving in Harrisburg were no longer willing to sit back and wait for several years before taking part in the legislative process. Clearly, some kind of drastic change was needed.

Sensing this public disenchantment with the legislative process early in 1972, the then minority party of which I was a member, decided to base its fall campaign on the issue of secrecy. As the out party, we pledged to end the secrecy and open up the legislative process to the public.

This campaign strategy was powerful medicine. When the final votes were counted in the legislative districts, our party was once again in the majority. Thus, by last January the time had arrived to make good our promise.

This was done in the form of House Rule 45, adopted in January 1973, which reads as follows: ". . . All meetings at which formal action is taken by a standing committee or sub-committee shall be open to the public . . ."

I am not prepared to claim today that after passage of the resolution, the Pennsylvania House of Representatives became a model of efficiency. However, a number of positive forces have been at work now that members of the press and interested members of the public may sit in on committee deliberations.

First, the kind of legislation which emerges from the committees is of noticably higher calibre. The chances are now that 18 to 20 legislators have gone over a piece of legislation, line by line, before finally agreeing to send it to the floor. Since this is done under the possible scrutiny of reporters and interested individuals, legislators in the committees are taking the time to learn more about each bill before speaking up.

In previous years one of our most important House committees was run by six members who had built up years of seniority. In fact, of the 23 members, usually only those six even attended the committee meetings.

This year, attendance at this same committee is running over 89% and those original six can no longer exercise complete control over legislation coming from their sessions. In fact, records we have kept indicate that many of our committees are now receiving over 90% attendance, a dramatic increase over prior years.

The participation and influence of all members has picked up remarkably under the new system as they find their abilities and energies being used. Undoubtedly they have to work harder. This spring, for example, the House Committee on Consumer Protection considered one bill for six full days before reporting it to the House membership.

Members are also having to spend more time in Harrisburg, since committee meetings are now mostly scheduled when the full membership is not in session.

Another positive effect of the open committee system is the wider range of press coverage given to issues before the legislature. Under the old system, reporters knew little about legislation until it came up for floor debate. Now, each chairman and each committee member has a stake in getting his point of view before the press.

I might add that this added press coverage can be a great help to the image of the legislature as an institution.

Even dissemination of information among the members becomes facilitated. Previously, knowledge about pieces of legislation was often a well-guarded perogative of the leadership. Thus, when a party caucus was held, the leader could spoon-feed information about particular bills as he desired with the result that the general membership could be misled and thus manipulated.

I remember one instance several years ago when a member from upstate Pennsylvania had promised his voters he would oppose legislative pension increases. When the bill to increase pensions appeared on the calendar, the leadership did not fully inform the caucus that it was buried in a particularly complicated bill. This member voted for the pension increase without ever knowing what he was doing.

Today, this kind of situation is less likely to happen. Too many members know about specific pieces of legislation because they have gone over it in committee. We have also noticed a far greater interest in the preparation of reports and letters for distribution to other legislators by committee members who have a stake in educating their colleagues about particular legislation.

Gone are the days when a powerful committee chairman can tell his subservient committee, "Okay, lets kill this bill and forget it". Now, a full and open vote is needed on each piece of legislation. The chances of a Governor or a special interest bottling up legislation are more limited under this new system where each member must vote publically before action is taken.

However, while many benefits accrue to both the legislature itself and the public at large by having an open committee system, there are pitfalls. Certainly, the job of Majority Leader becomes a more delicate and potentially dangerous position.

By disseminating power among the members and bringing more legislators into the process of government, the possibility of dominant, one-man rule be-

comes almost an impossibility. Rather than dealing with a few friends, the leadership must now work constantly with dozens of legislators who are working hard and want help to get bills considered. Failure to help his members carry out the projects into which he has placed them would be a risky business for the leader.

While risky, the stakes are higher. With increased action and better legislation being produced, the leadership is also in the position of governing a positive force in the state rather than an inactive and despised institution.

As I stated earlier, opening the committee system is not a panacea for all the problems of running a good legislature.

There are approximately 15 states in the country where open committee meetings have been adopted by the legislature. In several of these states, reports indicate that the new procedure has created nothing new.

In Pennsylvania, we have often been disappointed with the few people from the general public who have attended committee meetings. At times, there are not enough reporters to attend all the sesions being held on one day.

Nor would it be fair to say that open committees eliminated the influence of pressure groups or lobbyists. The opportunity for partisan politics can be used at committee sessions much more effectively than in the past. Opportunity for grandstanding by individual members for home consumption is certainly greater now.

All of these hallmarks of the legislative process continue. Still, it is now just a little more difficult to practice deceit. The possibility of tying up important public matters through the use of closed committees is limited.

To those state legislatures and to the United States Congress now considering the possibility of opening committee sessions. I would say "be prepared".

It is not enough to simply open the committees. Both the individual members and the leadership must be prepared to take on a great deal more responsibility than before if the new system is to produce results.

In fact, the role of the legislative leader must undergo several changes. He must be prepared to engage in a vigorous follow-up of the work each committee is performing. One of his main jobs must be to help the committee chairmen obtain needed information, secure proper staffing and be supported by an intelligent selection of committee members.

Motivating people rather than controlling them becomes the leader's dominant role.

To merely open the committee to the public and do nothing more is likely to invite the deserved charges of making cosmetic changes. An alert press and public will soon discover whether the legislative institution is really doing a better job or dealing in gimmickery.

In the Pennsylvania House, our experiment with the open committee system has, I believe, developed a closer sense of cooperation and loyalty among our legislators because they are involved and because they feel themselves to be an integral part of the group.

The old politics of secret, autocratic rule is being jeopardized by the positive energies of the legislative membership. While the statistical results of our experiment may still be hard to measure, this new atmosphere of excitement and optimism toward the very difficult tasks facing State government has made the institution a more hopeful place in which to solve the problems of our people.

WASHINGTON, D.C., *July 24, 1973.*

Hon. ABE RIBICOFF and Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF AND SENATOR CHILES: In response to your letter of July 16, I want to say I favor very strongly the idea of open meetings of all Congressional Committees. I think this should be automatic. Failing that, the next best approach, as the House has decided, would be to have the meetings open unless the committee specifically votes otherwise.

Some argue that open committee meetings would slow down the work of committees, would make them subject to greater pressure from lobbyists, and would give rise to public grandstanding by members. These are arguments against democracy. They represent a kind of elitist view which presupposes that some group, meeting in secret, can be depended upon for benevolent action, if they are shielded from the public. I believe the clear lesson of the Pentagon Papers is that governmental actions are more likely to be in line with our professed ideals when they are public actions. Further, I think the experience in House committees that have held open mark-up sessions and the experience in the Florida legislature shows that the people's business, when done publicly, is done just as well and probably more responsibly. At the very least, public meetings build public confidence in government, dispelling the notion that decisions are made because of private pressures.

Sincerely yours,

FRED R. HARRIS.

THE JOHNS HOPKINS UNIVERSITY,
Baltimore, Md., September 7, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: I am sorry that my answer to your letter asking my opinion of proposed changes toward more open Congressional committee meetings has been so long delayed. Your letter arrived while I was away from the office during the past summer.

My answers to the four questions you ask are as follows:

1. I would favor the more open House approach. It seems to me that the vitality of a democracy is directly related to the amount of "openness" its government exhibits. Circumstances—such as the presence of foreign adversaries—may require us to invoke secrecy in certain circumstances, but we should also recognize that we do so at some cost to the vitality of a democratic society.

2. There is no real evidence on the question of whether committees which do business in the open are less effective than committees which do not. In view of recent changes in legislative practice, we now have an opportunity to gather such evidence. Did House committees which recently shifted so as to operate under a more liberal disclosure policy suffer adverse consequences? Do counterpart committees in the Senate which still function under a closed policy operate any more effectively than House groups?

3. I think it best not to try to specify the grounds on which secrecy may be invoked. Experience under the Freedom of Information Act suggests that a list of specific exemptions from the requirement of disclosure tends to become a charter for justifying secrecy.

4. I think the appeal procedure against committee secrecy is a very useful device. Among other things, its existence is a reminder to committees that the legislative presumption is against secrecy. I think the more institutional mechanisms you can build into the system so as to

retard secrecy, the healthier it will be for the legislative process and for American politics generally. Admittedly, the appeals groups will not easily reverse a committee; indeed it should not. But its mere existence will, I think, incline committees to give the case for disclosure more weight than might otherwise be the case.

I hope these thoughts are of some help to you.

Sincerely,

FRANCIS E. ROURKE, *Professor.*

cc: Senator Lawton Chiles.

MOUNT HOLYOKE COLLEGE,
South Hadley, Mass., July 25, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: I'm very happy to respond briefly to the letter addressed to me by you and Senator Chiles concerning my views on S. 260.

Responding directly to the four questions that you put, I would reply as follows:

(1) I feel very strongly that the approach of the House Rules which permit Committee meetings to be open unless the Committee otherwise provides is the best arrangement. The temper of the times is such that a presumption toward openness is I think the most acceptable one, although for various reasons I do feel that closing should be permitted and even encouraged in a number of circumstances.

(2) I do not think that open meetings will impair the quality or speed of legislative decision-making, unless possibly they are accompanied by a greatly extended privilege of testifying before the Committees. At the same time, I do think that there need to be ample opportunities for a Committee to act in Executive Session, since without that possibility I do think that the speed and quality of Committee decisions would be impaired.

(3) I feel very strongly that the terms under which a meeting should be closed should be left to the discretion of the Committee in question. It seems to me that any effort to specify the grounds of exemption is bound to be a failure and that once such grounds are set, any attempt to broaden them subsequently would be extremely difficult.

(4) I think the creation of the Select Committee on Meetings is a reasonably workable procedure, although it would be more difficult to work, obviously, if the grounds for closing were not specified. Some appeal procedure probably is in order, especially if those grounds are not made explicit, and I would say the device that is proposed in S. 260 is a reasonable one.

My strongest feeling about the bill as it stands is the extension of the requirements of the legislation to conference meetings. This it seems to me would be a serious disadvantage on a great many counts. Conferences commonly, as I understand it, are in fact negotiation meetings. Certainly there is ample evidence to indicate that negotiation on important matters in open meetings tends to harden positions, to make

compromise more difficult, and to result in a series of disadvantage to the operation of the legislative process. It seems to me that the requirement of full reporting on conference meetings and closer accountability to the two Houses from conference meetings would be far preferable to the device of throwing them open to the public.

These are very random and hasty reponses, but I send them along rather than delay interminably my reply to your inquiry. I should be very glad to expand on any of these points if it would be of service to you.

Sincerely yours,

DAVID B. TRUMAN.

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., September 5, 1973.

Hon. ABE RIBICOFF and Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATORS RIBICOFF AND CHILES: I appreciate the opportunity of commenting on the question of open or closed Congressional committee meetings. As usual, the problem is one of choosing between two partially competing values: openness to the public and the effectiveness of Congress.

Openness, I believe, requires that committee meetings be public unless the committee votes to close them. The preference should be in favor of openness. The effectiveness of Congress as a decision-making body, however, requires strong committees. Without the specialization and the division of labor that committees provide, Congress would be unable to conduct business with intelligence and dispatch. The need for Congress to maintain its importance is so great that I would not require its committees to give reasons for closing their meetings. It should be sufficient that the members wish to talk privately among themselves.

The tendency today to distrust government should not be allowed to render Congress ineffective. The important political functions that politicians perform as brokers cannot be carried out in public. Congressmen must be free to talk to each other in a confidential way and to arrange these meetings to their varying preferences. At times this may mean extremely held views have to be compromised. If meetings are held in public, the compromises will either not take place or, worse still, the need for accommodation is likely to make the Congressmen arrange to get together privately. Congress would either be misleading the public as to the real openness of the meetings or denigrating its committees as a place where important decisions are made, not merely registered. I am against creating a new Congressional committee, a "Select Committee on Meetings," to research disputes on whether meetings should be open or closed. Such a committee would add to the complexity of Congressional life without corresponding advantage. The surest way to render Congress ineffective is to compel it—worse still, have Congress compel itself—to go through tedious procedures.

On the contrary, consideration should be given to various methods of making Congressional life simpler rather than more complicated. There is really no way to force Congressional committees to make decisions in public that their members would rather make in private. Like everyone else, Congressmen will find ways to do what they want to outside the rules. It would be better, then, to move toward greater openness by requiring an explicit decision—a deliberate act—to close a meeting. This would at least guard against an assumption in favor of secrecy. The rest must be left up to the committees.

The rule, however, ought to work evenly and impartially. By that I mean that committees should either open or close their meetings to outsiders. They should not invite some groups and not others. I realize the committees may want assistance and may feel it desirable to invite representatives of various groups to meet with them at some sessions. However, if that is done, I feel it would be better if all interested parties were invited or none were invited. It is important that Congress be seen to be doing justice.

The questions you raise deserve considerable thought because they in turn raise another question I consider to be of the utmost importance: Will our politicians talk straight to the people in telling them not only what it is right to demand but what it is legitimate to receive? It is right for the people to be informed, but it is also essential for the Congress to be effective. If people want good decisions out of Congress, they must understand what it takes to get them; and they will never understand unless those who know best (the Congressmen themselves) tell them. It would be a pity if, in responding to current fads, Congress deprived itself of the means for fulfilling future expectations. How is anyone to know what a Congressman needs unless he is willing to stand up for himself? It would be desirable that Congress take this opportunity to express to the citizenry the requirements for decisionmaking in a large and heterogeneous body.

Sincerely,

AARON WILDAVSKY.

The following letter on title II of S. 260 was sent to various organizations and experts in the field of executive procedure in July 1973 setting forth specific questions for consideration. Their replies follow this letter.

DEAR SIR: Enclosed is a copy of S. 260, the Federal "Government in the Sunshine Act", of which Senator Lawton Chiles is the chief sponsor and which has been referred to the Subcommittee on Reorganization, Research, and International Organizations for consideration. The bill requires that all meetings of congressional committees and multimember Federal agencies be open to the public, except under certain exemptions.

As the subcommittee is planning to hold hearings in the near future, we want to receive a wide range of opinions concerning this legislation. We would therefore appreciate receiving your views and comments on the provisions of this bill. Specifically, we would like your opinions on the following questions included in your analysis.

QUESTIONS RELATING TO SECTION 201 OF S. 260

1. Do you agree that requiring all meetings of multimember agencies to be open to the public would increase public confidence in administrative decisionmaking and enhance agency responsiveness? If not, what alternatives would you suggest?

2. What methods would you suggest to require that meetings of single member agencies, such as EPA, be open to the public?

3. What would be the likely effect of an open meeting requirement on the relation between agencies and (a) the media, and (b) organized interest groups?

4. Do you think the open meeting requirement should apply to all agencies as defined in the Administrative Procedure Act or a limited group of specific agencies, such as the independent regulatory commissions?

5. In Section 201(a) the open meeting requirement is defined as applicable to "all meetings . . . at which official action is considered or discussed." This clearly applies to formal meetings; however, there are questions as to its further applicability, e.g., should it apply to informal meetings of less than the entire membership of an agency, or a meeting between subordinates and a member? Should this section be more clearly defined?

6. As drafted, S. 260 requires agencies to promulgate regulations implementing these requirements, subject to court review. Do you agree with this provision or do you feel that approval should be made by the Administrative Conference?

7. S. 260 exempts from the open meeting requirement the conduct or disposition (but not the initiation) of cases of adjudication of cases of adjudication subject to the hearing requirements of 5 USC 554(a).

8. On the other hand, do you feel that agency meetings to initiate adjudicatory proceedings be open to the public? Should there be an exemption for decisions to initiate criminal proceedings? Should the Justice Department be exempt from this provision?

QUESTIONS RELATING TO SECTION 202 OF S. 260

1. Do you believe it desirable to regulate by statute ex parte communications in cases of agency adjudication required under the Administrative Procedure Act to be decided on the basis of a record established by a hearing?

2. Do you believe it desirable to regulate by statute ex parte communications in cases of agency rulemaking that are subject, under the Administrative Procedure Act, to requirements of public notice and opportunity for comment? If so, should such a prohibition also apply to rulemaking proceedings relating to public property, loans, grants, benefits or contracts within the meaning of 5 U.S.C. 553 (a) (2)? Should such a prohibition apply to proceedings to prepare environmental impact statements?

3. Is there a feasible way to differentiate by statutory definition rulemaking proceedings involving major questions of public policy, where a prohibition of ex parte communications might significantly enhance public confidence in the decisional processes of government, from proceedings involving comparatively minor matters, where the administrative burdens involved might outweigh such benefits?

4. As drafted, S. 260 prohibits ex parte communications by "interested persons," including members or employees of other governmental agencies. Should there be a definitional elaboration of who is an "interested person" for purposes of the statute? Should members of employees of other governmental agencies be exempted from one prohibition of ex parte communications?

5. As drafted, S. 260 prohibits ex parte communications from agency members, hearing examiners, or employees to "interested person." Is this prohibition sound and workable? If not, is there a feasible method of deleting it without gravely impairing the effectiveness of the prohibition against ex parte communications from interested "outside" persons to one agency?

6. Are the provisions in subs. 202 regarding the time at which the prohibition against ex parte communications becomes operative sound and workable? Do they, particularly in cases of rulemaking, facilitate evasion of the prohibition? Could you suggest more effective provisions?

7. As drafted, sub. 202 requires that agencies promulgate regulations to implement the prohibition on ex parte communications, subject to court review. Would it be preferable to require that such regulations be approved by the Administrative Conference?

8. Should the prohibition against ex parte communications by an "Interested person" apply to inquiries by Congressmen, or should they enjoy a complete or partial exemption from such one prohibition?

9. Is there any feasible way that a statutory prohibition against ex parte communications can be applied to informal agency decisionmaking on major policy issues without unduly burdening the agencies. Is

there an alternative to prohibition of ex parte communications that might serve to ventilate informal decisionmaking or major policy issues?

10. As drafted, the prohibition against ex parte communications becomes operative at the point where "a proceeding is noticed for hearing or opportunity for participation by interested persons unless the person responsible for the communication has knowledge that it will be noticed, which case said prohibition shall apply at the time of his acquisition of such knowledge." Does this provision offer too great an opportunity for circumvention of the Act's requirements by postponing the stage of formal proceedings until major policy issues have already been resolved informally? If so, are there alternative provisions for defining the time at which the prohibition of ex parte communications becomes operative that would narrow the opportunities of circumvention without unduly burdening the agencies?

Your assistance in this matter will be greatly valued by the Subcommittee. We look forward to hearing from you.

Sincerely,

ABE RIBICOFF.
LAWTON CHILES.

AMERICAN SOCIETY FOR PUBLIC ADMINISTRATION
Washington, D.C., November 7, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN RIBICOFF: In response to your July 2 request to comment on the provisions of S. 260, "Government in the Sunshine Act," eight members of our committee on Public Policy Affecting Public Administration, with special interests in this area, were asked to review and comment on the proposed legislation and related questions. The following statement reflects the views and opinions of those committee members:

Within the American experience, the realization of democratic practice springs from the recognition that government derives its authority from, and places its trust in, the people comprising its citizens. As the people are sovereign, so are they empowered to obtain information regarding the operations and activities of their government. In the event that elected public servants fail to respond to requests for information regarding matters of state, then the electorate may attempt to replace them. Those seeking documentary materials from the Federal bureaucracy may petition for them under the Freedom of Information Act (5 U.S.C. 552). Enacted in 1966, this statute provides requesters with both an administrative procedure and court redress to obtain particular items from Executive Branch files.

Documentary accounts of governmental action are, however, secondary sources of information for the citizenry. They constitute a record of what has transpired and, while a statement of proceedings may be available to the public, the actual meeting might very well have been closed to all except those participating in the deliberations. To the end that more meetings of the Executive Branch offices and congressional committees might be open to public observation, the provisions of S. 260, the "Government in the Sunshine" Act, are desirable. The presumption of such a law is in direct accordance with the principles of democratic practice inherent to our system of government: policy-making meetings should be open to scrutiny unless the governmental unit in question determines, with proper justification, otherwise. Precedent for such a condition in affairs of state may be found in the Freedom of Information Act (P.L. 90–23), the Federal Advisory Committee Act (P.L. 92–463), and Rule 11 (§ 734) of the House of Representatives for the 93rd Congress.

Such a requirement would not seem to delay decision-making or impair its quality. Indeed, open sessions of meetings might well serve to encourage better organized and more structured proceedings. Also, as the public obtains increased access to the policy-making gatherings of government, the media would, accordingly, have greater entrance to such activities as well. This situation might suggest that the media

would bear increased responsibility for accurately, responsibly, and concisely reporting and interpreting these events.

On the other hand, there is not any reason to believe that the enactment of the Sunshine law would have any profound influence upon the covert activities of interest groups. The pressing of an interest does not now visibly occur in the arenas of open policy-making deliberations. Responsible interest groups will continue to present their cases in government meetings in full view of the public and the media. Those seeking to effect a policy inimical to the public good will continue to utilize avenues of influence outside the scope of the Sunshine statute. This situation, however, should not be regarded as a weakness of the proposed legislation, but rather a matter which should be more directly addressed by some other instrument.

If the operating presumption is that meetings cannot be closed to the public without good cause, the specificity with regard to the demand for secrecy is essential. To the extent that the permissive exemption clauses of the Freedom of Information Act and the Federal Advisory Committee Act have functioned to foster the faithful administration and operation of those statutes, then similar provision should be made in any law affecting presumed open meetings in government. While such exemptions would desirably limit the range of options for closing policy-making deliberations, their existence does not assure their proper application.

On this particular point one must note a comment made in the report of the House Foreign Operations and Government Information Subcommittee regarding certain findings pertaining to the first five years' administration of the Freedom of Information (FOI) Act. At one juncture the panel commented: "The nine exemptions in the act which permit withholding of information have been misused by Federal agencies. Confused interpretations of agency regulations, the desire to withhold records which might embarrass an agency, and misunderstanding of court decisions affecting these exemptions, have all contributed to the problem. These deficiencies can only be corrected by amendments to the FOI Act itself." [1] Such amendments have been offered (H.R. 4960, H.R. 5425, and S. 1142) during the 93rd Congress and are now being acted upon.

With regard to the language of the exemption clauses of S. 260, certain phraseology from the Freedom of Information Act might be desirable. Exemption 1 of S. 260 (p. 3, line 11–13; p. 13, line 20–22; and p. 18, line 18–21) might be altered to read: "will disclose matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." This language would restrict considerations of "secret matters" to the guiding provisions of the operative Executive order governing classified information. It also utilizes the more specific referent "national *defense*" rather than the often troublesome term "national *security*." These changes are noted both for reasons of clarity and specificity in the interpretation and administration of a statute such as S. 260 seeks to establish.

The other exemption clauses of S. 260 appear to be most sound and workable as presently stated.

---

[1] U.S. Congress, House, Committee on Government Operations. *Administration of the Freedom of Information Act.* Washington: U.S. Govt. Print. Off., 1972. (92nd Congress, 1st session. House. Report no. 1419), p. 11.

The bill also provides for the creation of a Select Committee on Meetings. Such a panel could certainly be useful in terms of effectuating a proper adherence to the law within Congress. However, it may not be necessary to create a new unit to carry out this function. Other candidates for this task might be the Joint Committee on Congressional Operations or the House Rules Committee and the Senate Rules and Administration Committee.

Recognizing that significant policy changes can be made within congressional conference committees, the provisions of S. 260 should, in all probability, extend to those panels as well.

The Sunshine law should apply to all Executive Branch agencies holding proceedings under the Administrative Procedure Act (60 Stat. 237). The extent of the statute's application should be held to this act and environmental impact statement matters as currently specified within the bill. Attempts to arrive at any more finite definition of coverage would only burden the instrument with cumbersome language. The spirit of the bill is clear. Attempts to defeat its purpose can be dealt with by Congress or the courts in a manner suitable to discourage such defiance.

With the enactment of S. 260, the Executive Branch agencies will promulgate regulations to implement its requirements. Such regulations will, of course, be subject to court review. However, as with the case of the Freedom of Information Act, prior to any actual issuance of such regulations, the Administrative Conference of the United States might be requested to prepare a model draft regulation to assist the agencies in drawing up uniform and proper instruments for implementing the act.[2]

Also of relevance to the proposed statute are two recommendations of the Administrative Conference which might be utilized by the Executive Branch agencies in interpreting the thrust of the law. Recommendation No. 1 adopted December 10, 1968 calls for adequate hearing facilities for federal administrative agencies operating in the field. Such a proposal seeks to preclude the argument that inadequate physical facilities might serve as a basis for limiting public access to such proceedings.[3]

Recommendation No. 28, adopted December 6, 1971, calls for public participation in administrative hearings. While certain individual departments or agencies may have adopted these recommendations in whole or in part, they have not been accepted throughout the Executive Branch.[4]

To maintain consistency within the proposed statute, it would seem advisable to strike the word "present' from those portions of the bill wherein it is utilized to otherwise limit the number of officials required to close a proceeding (p. 3, line 8; p. 8, line 20; p. 13, line 18).

The provision for "inspection" of meeting transcripts (p. 5, line 20; p. 15, line 19; p. 21, line 10) should not be interpreted on a need-to-know standard, for the Freedom of Information Act would be applicable in this area. Similarly, even if an individual were required to

---

[2] Regarding the Freedom of Information Act recommendation see Administrative Conference of the United States, *Recommendations and Reports of the Administrative Conference of the United States* (Vol. 2). Washington: U.S. Gov't Printing Office, 1973, pp. 18–24, 119–175.

[3] See *Ibid.* (Vol. 1), pp. 9–11, 45–58.

[4] See *Ibid.* (Vol. 2), pp. 35–42, 376–448.

hand copy transcripts, the agency or department having the document could not deny or long delay access to the record simply because there were not adequate facilities or accommodations. This matter of possible administrative difficulty can receive guidance from agency experience in administering the Freedom of Information Act. Indeed, the Executive Branch might consider that public information and public affairs officers within the departments and agencies might be the most appropriate supervisors of the transcripts of meetings.

Under Title II, Sec. 201(g), provision might be made for a responsive pleading deadline on the part of the government. Generally, an allotment of 20 days would seem feasible for agency attorneys or congressional counsel to respond to a suit brought under this section.

To the extent that ex parte communications, as noted in Sec. 202 of the Sunshine law, bias a proceeding with unchallenged information, statutory regulation of such communications is desirable. However, it is not immediately clear as to how the publication of these communications would penalize those violating the prohibition provisions of S. 260. It would appear that Sec. 202 is a regulation provision lacking sanctions.

The reference to "interested person" (p. 25, line 3) might be further developed to exclude legal counsel or administrative counsel on matters not immediately central to the substance of a case under hearing. However, the understanding of the term "interested person" should probably include personnel of the Legislative Branch.

As suggested earlier, agency regulations promulgated to implement Sec. 202 of the act would be subject to court review. Model draft regulations on this matter might be prepared by the Administrative Conference of the United States but actual review of agency regulations does not seem advisable given the advisory role of the Conference.

With regard to the question of the act's coverage of informal decision-making, it would seem appropriate at this juncture to proceed with the current language of S. 260. To further develop the type of coverage sought in the statute, a careful report on the bill should be made and close scrutiny of the law's operation should be undertaken. After some period of time—perhaps a year or two—the administration and operation of the act, related agency regulations, and court interpretations might be reviewed and amendments could then be made accordingly.

If you or your staff are interested in any additional information in this matter, we will be most pleased to be of any possible assistance.

Sincerely,

SEYMOUR S. BERLIN,
Executive Director.

THE UNIVERSITY OF CHICAGO,
Chicago, Ill., August 8, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: You have asked me in your two letters of July 10 and July 31 to comment on S. 260, and I am glad to do so. I

am in agreement with the basic purpose and the basic method of the Government in the Sunshine bill.

My opinions in answer to your eight specific questions are as follows:

1. I strongly agree that requiring all meetings of multimember agencies to be open to the public would increase public confidence in administrative decisionmaking and enhance agency responsiveness.

2. By "meeting of single member agencies," I assume you mean meetings of a single agency head with his advisers. The American tradition is strong that what is said by advisers to an executive should be privileged, as the legislative history of the Information Act shows. But the tradition is not necessarily beyond challenge. I see no significant difference between a meeting of a single agency head with his advisers and a meeting of the plural members of an agency. Both meetings should be open with respect to the consideration of policy problems. Both kinds of agencies should be forbidden to hold closed meetings, formal or informal. Yet some exceptions for particular kinds of information may be necessary, as the bill proposes.

3. Open meetings would at first cause consternation and opposition. But gradually open meetings would be accepted. Making more of the realities known to the public would facilitate criticism, and the principal result would be to improve the quality of what is done. Furthermore, the democratic influence would be stronger. The relation between agencies on one side and media and pressure groups on the other side would be improved, because misunderstanding resulting from partial information, as distinguished from full information, would be reduced.

4. Singling out independent regulatory agencies for openness would in my opinion be objectionable, because the need for openness may be greater in other agencies. In my opinion, the Department of Justice is especially in need of openness, for secrecy there is more harmful. The agreement that was reached between officers of the Justice Department and ITT—whatever the deal was—should have been open to the public, and the process of arriving at the deal should have been open to anyone who wanted to be present, including the press. I know that officers of the Department would strongly oppose what I am saying, and I realize that longstanding tradition is with them and not with me, but I think that openness with respect to informal agreements not to prosecute is peculiarly needed. Indeed, I think that openness of the decisionmaking process of U.S. Attorneys is also essential, even though many well-meaning but misguided people would say the opposite. Some types of information, of course, must be kept confidential, as the bill provides, but a great deal of what U.S. Attorneys do should be shrouded in secrecy.

Policies of prosecuting agencies about what to prosecute and what not to prosecute are often more important to practical people than what the statutes provide, because the policies, more than the statutes, control what happens in fact. Such policies are therefore in the nature of law. And secret law is always an abomination.

What I am saying may seem to some to be radical, for it is contrary to deep-seated traditions. But it is high time those traditions should be reexamined. The traditions are not planned but are the product of longterm drift, and no rational planner would make them what they are, in my opinion.

5. Both formal meetings and informal meetings should be open. Indeed, the reasons for opening informal meetings are greater than those for opening formal ones, because the formality usually involves protections that are absent in informal meetings. The openness requirement definitely should apply to informal meetings of less than the entire membership of an agency, and it should apply to meetings between subordinates and a member. The problem of principle seems to me to have a clear answer; the difficulty has to do with problems of how far the principle can as a practical matter be carried out. When two colleagues have lunch together, they can hardly be forbidden to talk about problems of policy and they can hardly be required to give notice of what they are going to talk about.

6. Court review is in all respects appropriate. The Administrative Conference, of which I have been a member during the five years in its existence, is not geared to performing the kind of function suggested, in my opinion.

7. Cases that go to trial-type hearing should not be exempt from the requirements of openness. I realize that some will say that when an agency decides a formal adjudication, it is doing what the Supreme Court does when it makes a decision and that it would be unthinkable for the Supreme Court to deliberate in public. The Swiss Supreme Court has openly deliberated for a century or more, with results that are wholly beneficial and without harmful results. I have had the benefit of a delightful discussion of that experience with a retired judge of the Swiss Supreme Court, Judge Huber. He taught me that some of my natural American assumptions are merely assumptions that are unsupported with understanding or analysis, and that judges who are conferring with each other are not and should not be ashamed of making false starts when they are thinking about difficult problems. Other top courts of nations over the world also operate openly; I have heard that the Mexican Supreme Court does, but I cannot confirm that, as I can in the case of the Swiss Supreme Court.

I do not now advocate that our courts should be required to deliberate openly; we are probably not ready for that. The proportion of the policy ingredient in what agencies do is generally higher, and therefore making a beginning with respect to agencies seems appropriate. Experience with judicial openness in other countries can be helpful in deciding what to do about our agencies. Again, I think that some of our usual American assumptions can be profitably reexamined. Possibly the committee should consult some of the judges of the Swiss Supreme Court, for I am convinced that they may have some understanding that is beyond the range of vision of most Americans.

8. You ask whether agency meetings to initiate adjudicatory proceedings should be open to the public and whether an exemption to openness should be allowed for decisions to initiate criminal proceedings. My answer is an emphatic no. Openness, to the extent feasible, is *especially* needed with respect to the exercise of prosecutors' discretion.

Americans have been fearful of bureaucrats and have invented all sorts of protections and safeguards, including the Administrative Procedure Act. But the protections have to do mainly with formal proceedings, especially formal adjudication. During the past thirty

years, we have dealt with the leaky roof over formal adjudication, and even the tiny holes have been plugged up. But while we have been preoccupied with formal adjudication, the huge holes in the roof over the prosecuting function have been completely neglected and are in need of attention. The roof over prosecuting not only has holes in it; some of that roof has never been constructed. The water pours through in streams, while we go on working on slow drips in the roof over formal adjudication.

The power to initiate formal proceedings is an enormously important power. It is exercised by regulatory agencies, by licensing agencies, by tax officials, by immigration officers, and even by welfare agencies, as well as by those we call "prosecutors." The negative power—the power not to initiate—is the one that is most abused, because it is exercised typically in secret, without insulation of officers from ulterior influence, without making formal findings, without systematically stating reasons, without using systems of precedents, without criticism from outsiders, without criticism from supervisors, and without openness.

My estimate is that the power to prosecute or not to prosecute is abused perhaps ten times as much as the power to decide after formal hearings have been held.

No unit of the whole government is more in need of required openness than the Department of Justice in the exercise of discretion to prosecute or not to prosecute. Of all the possible tools for controlling that huge power, openness is one of the most important. Exceptions for some types of information obviously have to be formulated. But the requirement of openness should *especially* apply to the discretion of the Department of Justice to prosecute or not to prosecute, in my opinion.

As you see, I strongly support Government in the Sunshine. But one feature of your bill seems to me ill-advised. Section 202 of the bill would add § 557a to the Administrative Procedure Act, and I suggest that you should reconsider §§ 557a(2) and 557a(3). My fundamental observation here is that ex parte communications cannot properly be forbidden except with respect to on-the-record proceedings, and yet that is what your bill does.

The bill may be sound as it applies to on-the-record rulemaking, and it may be sound in requiring the open recording of ex parte communications, but it is in my opinion quite unsound in forbidding ex parte communications in absence of an on-the-record proceeding.

Ex parte communications from those with interests at stake are a part of the essence of democratic government. The only sensible reason to cut them off is in order that a record of evidence may be protected. But when you have no record of evidence, you have no reason to forbid ex parte communications.

Just as a Senator at a cocktail party may properly listen to a constituent or lobbyist as to what legislation ought to be enacted, so an administrator who is performing a subordinate legislative function through rulemaking should be available to listen to what anyone wants to tell him in any kind of ex parte communication—unless the integrity of a record of evidence has to be protected. We don't want restrictions on ex parte communications when administrators are de-

termining policy through notice-and-comment rulemaking; we want full freedom for any and all ex parte communications.

Your § 557a(2) applies to notice-and-comment rulemaking under § 553 of the Administrative Procedure Act. It is not limited to rulemaking on the record. It is therefore unsound.

Your § 557a(3) applies to environmental impact statements under NEPA. It is sound as it applies to such statements that are made through on-the-record proceedings. But ninety-nine percent of environmental impact statements are made without on-the-record proceedings, and the bill is clearly unsound in forbidding ex parte communications in absence of on-the-record proceedings.

Despite my enthusiasm for Government in the Sunshine, you will note that I have not said that the country is ready for adopting the views I have expressed. Nearly all bureaucrats are opposed, and their views are hard to override. But their views were rejected in the Information Act, and they can be rejected again. I am pleased that the leadership is in the hands of two masterful politicians, and I wish you well.

I shall be glad to assist in any way I can.

Sincerely yours,

KENNETH CULP DAVIS.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
New York, N.Y., July 18, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: I have your letter of July 10 asking me to comment on S. 260, the "Government in the Sunshine Act" which you are sponsoring.

Although I entirely honor the purposes of your proposal, I am not in sympathy with it or with the thrust of the questions raised concerning section 202, amending the Administrative Procedure Act. Ex parte communications are not necessarily wicked. My letter to you is an ex parte communication, as far as that goes. Nor do I share the view, though I know it to be widely held, that every conversation behind closed doors is a threat to public safety and good morals. I think the risk of inhibiting discussion outweighs the risk of improper discussion.

As I dictate this letter, I am well aware that I am responding in a rather gross and casual way to questions which have many subtle aspects. Let me attempt to summarize a little more delicately the position I take about ex parte communications. They are improper in themselves only when a decision purportedly rests solely upon the material which has been openly presented and whose existence is known. In that particular type of proceeding, a determination has been made that information and opinion from external sources should not be received because those affected by it have no opportunity to counter it by rebuttal, cross examination, or further argument. In most public affairs, by contrast, information from every quarter, no matter how informally it may be provided, is thought to be an asset to good government, rather than an interference with the administration of jus-

tice. I should hate to see the day come when an agency concerned with making rules applicable to many persons throughout the country would be inhibited in receiving information or expressions of opinion from any source, by letter or telephone call or personal visitation. Section 202 of your proposal would seemingly have that consequence, since it brings within its reach rulemaking as well as on-the-record adjudication.

As for the open meetings provision, I simply do not see how the Governors of the Federal Reserve Board, for example, could meet in the open to discuss and decide upon a change in the interest rates or how the persons responsible for economic stabilization could meet in the open to discuss precisely what steps they might next initiate in order to combat inflation. The observers of the open proceeding, I venture to guess, would be those who would profit most from having a few moments' head start on competitors, in adjusting to changes in government regulation.

Moreover, as I think back upon my own experience in and out of government, many entirely honorable and useful solutions to disagreement have been reached through the confidential consideration of a form of words which would be face-saving. The process of negotiation and compromise, with which you as a legislator must be far more familiar than I, can hardly be conducted successfully in front of a television camera.

Finally, I recently had occasion to look at the "Government in the Sunshine" statutes in the various states which have adopted them, including your own. I must say that the experience around the country has not led me to think that the effort of securing the enactment of those statutes is rewarded by their consequences. New Jersey is one of the states which has had a fairly stringent enactment of this general kind for many, many years. Certainly New Jersey is not one of the states most highly regarded for the probity of its official processes. In short, though I do very sincerely applaud the purposes of this kind of law, and do very sincerely honor those who press for heightening the level of governmental morals, I am dubious that this is the mechanism which will produce the desired results.

Permit me to add, if I may, that I have great respect for you personally. Everyone I know who has had contact with you or has had occasion to observe your public activities has become an admirer. I wish you well in your career.

Sincerely yours,

WALTER GELLHORN,
Professor.

July 17, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: At this time when there is such national attention focused on closed-door leadership in the Executive branch of government, your initiation to open up Senate committees to the public and the press is a credible and positive idea. This is the moment for Congress to regain its stature in the eyes of the public. This can help accomplish that aim.

I favor all committee meetings being open unless they are dealing with highly sensitive national security issues or monetary questions which could be taken advantage of by special interests.

With best regards,

Sincerely,

WALTER J. HICKEL.

cc: Hon. Lawton Chiles.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., August 7, 1973.

Hon. ABE RIBICOFF and Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATORS: I must apologize for overlooking your questionnaire on § 201 of S. 260. I am afraid that I have not had time to give the questions much thought. I find them very difficult and I am unable without more thought and discussion to come to a firm conclusion.

My initial reaction to § 201(a) is skeptical. I see the rule-making process to which, as I understand it, the bill primarily directs itself, as one of maturation in which there are many inputs over time from interested groups, from staff and from informal discussion among the members of an agency. I can see the advantage of a public meeting in which when a rule is about to be voted up or down the members discuss the considerations which led them to their conclusions. But the idea that whenever the agency has on its agenda the consideration of an ongoing rule-making project, there must be a public meeting is questionable. It seems to me onerous for agencies already overworked to have to prepare constantly for public meetings; and I think it is illusory to suppose that it will reveal the actual process of decision.

Skeptical as I am about the major provision of the bill, my answers to the other questions are rather obvious. I do not even understand what is meant by the meetings of a single administrator. Who does he meet with? In line with my previous answer, it would be appropriate before an administrator announces a regulation to have a meeting open to the public in which he outlines his thinking. But that, of course, falls short of a meeting whever he "considers" what he is going to do. This upshot as to a single administrator makes the requirement of § 201(a) somewhat arbitrary. It means, for example, that the FCC which over the course of time considers children's television must hold a number of public meetings (if indeed that is the intention) whereas for questions concerning the environment there are no such meetings. Yet is there a distinction between problems of television and those of the environment which warrant a difference in procedure? Are tax regulations substantially different in this respect from regulations dealing with stock exchanges?

Perhaps my skepticism will yield on further consideration but at the moment I have no great enthusiasm for the major idea and *a fortiori* for extending it in various more or less logical ways.

Sincerely,

LOUIS L. JAFFE,
Byrne Professor of Administrative Law.

THE URBAN LAND INSTITUTE,
Washington, D.C., July 20, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: This is in response to your letter to me, dated July 10, requesting my views on S. 260, "Government in the Sunshine Act".

I suggest that you may wish to examine the enclosed article, "Freedom of Information—for Whom?" which I wrote for *The Bureaucrat*, Vol. 1, No. 2, Summer of 1972. This sums up my views as carefully and comprehensively as I could assemble them, on freedom of information.

I particularly call your attention to the quote on page 203 from that great educator-philosopher, Alexander Meiklejohn. I have long agreed with Dr. Meiklejohn (and his good friend the late Justice Black) that the founding fathers said exactly what they meant when they framed the first amendment to the Constitution.

I find the questions you enclosed much too esoteric and obscuranted for my understanding, even though I have been in the news writing and publishing businesses for more than three decades. If it is worth your trouble to decode them for general understanding, I shall be glad to answer them. Otherwise, my statement above stands. Another action would help: a statement explaining why the original Freedom of Information Act is inadequate and in which particular ways S. 260 would correct such inadequacies.

Thank you for allowing me to participate in this discussion, which is so basic to our democratic process.

Sincerely,

SYDNEY H. KASPER,
Communications Director.

[From the Bureaucrat, vol. 1, No. 2, summer of 1972]

FREEDOM OF INFORMATION—FOR WHOM?

(By Sydney H. Kasper)

To tell or not to tell—that seems to be the nub of the question of freedom of information. Whose ox has gored whom is about as good a measure of the arguments about freedom of information as any.

Every new administration that comes to Washington to occupy the seats of the mighty begins with a public pontifical proclamation that it will conduct a "fishbowl operation." This follows in the tradition of Woodrow Wilson's ludicrous (and unfortunate, as it turned out for him) statement about "Open covenants openly arrived at." Wilson's innocence was shattered at Versailles, but Thomas Jefferson escaped such obloquy. His ringing declaration that ". . . all men are . . . endowed by their Creator with certain unalienable rights" was just as fatuous, but can be excused because it was in inflammatory exhortation, and enough people believed it to undertake a successful revolution. The fact that every generation since Jefferson's has had to fight to secure those rights has escaped most historians.

Obviously the views of Jack Anderson and the White House on who is entitled to know what and how much are going to be quite divergent. Also, between the present Administration and Congress there is little agreement. And within the

Administration there is a continual struggle, sometimes quite bitter, about how much should be divulged to either superiors or subordinates. The man on the street feels quite frustrated when he discovers that government leaders have been withholding information from him on the background for various decisions; yet, when his young child asserts his right to freedom of information about sexual matters, the father may well answer, "Ask your mother, I'm busy right now."

The implications of freedom of information have spread far beyond the relatively simple boundaries of government papers. Now the government agencies are confronting advertisers with demands for accurate reports on "Works three times faster," "Preferred by housewives eight to one," and "Approved by leading universities for its better taste." And *The Washington Post* is castigated for denying free speech to an advertiser wishing to blast competitors in the supermarket business.

In the three solid volumes of *The Pentagon Papers*, the issue of freedom of information is joined. For seven days last summer a group of congressmen, the Foreign Operations and Government Information Subcommittee of the House, listened to, argued with, and quizzed intensively an array of witnesses from government, academia, and the news media. During this time the Supreme Court was considering the historic case involving "prior restraint" over publication of the so-called "Pentagon Papers."

As William S. Moorehead, chairman of the subcommittee stated in the report:

"We have dissected the question of executive privilege, wandered through the maze of Defense Department security classification procedure and heard details of the constitutional basis of freedom of the press. We have explored the responsibilities of the public media in protecting the people's right to know and the intricacies of Executive Order 10501. We have heard eloquent testimony restating the rights and duties of Congress to obtain necessary information from the Executive to perform our constitutional responsibilities. We have heard numerous case histories of abuse of the security classifications as well as vigorous defense of the system.

"We have received suggestions as to how the present dilemma between right of Congress and the people to know and the need to safeguard legitimate defense information might be resolved through legislative or administrative action."

If one is seeking a victory, the result was, as these hearings so often are, a stand-off. Some witnesses and congressmen negated others, some engaged in irrelevancies; but, from their statements all were sincerely concerned with what is happening to our most cherished freedom, that of free speech and the right to know. The issue was—and still is—a grave concern with the classification system—or lack of one—used by the Executive Branch to withhold documents and other information from not only the general public, but also our lawmakers.

VOLUME

The sheer volume involved in our national secrecy effort boggles the mind. William G. Florence, a retired security expert, who helped write Executive Order 10501, the regulation that defines the various kinds of information that must be kept from the public, testified at the hearings that "In addition to the 31,000 people in Defense, about 10,000 of whom are civilians, with the authority to classify documents, there are another 6,000 in the State Department with original classification authority, plus thousands in 57 other government agencies which have security systems."

William Macomber, Jr., Deputy Under Secretary, Department of State, testified that State accumulates in its central files some 400,000 documents a year, of which about 200,000 are classified; that during the past 20 years, State has averaged about 100,000 documents a year, or a total of about two million classified documents!

But that's not all. David O. Cooke, Principal Deputy Assistant Secretary, Department of Defense, told the committee that "There could possibly be more than 20 million classified documents." Congressman Ogden Reid pointed out that, on the basis of Cooke's estimate of six million cubic feet of active files, 17 per cent of which are classified, the total amount of classified materials could occupy a million cubic feet, "the equal of 18 stacks of documents 555 feet high, each as high as the Washington Monument."

And the cost of the security classification system is estimated to be more than $50 million a year.

Now, what kind of "secret" documents are involved in such horrendous figures, mountains of papers, and thousands of government workers?

Executive Order 10501 defines "top secret," "secret," and "confidential" information. Mr. Florence told the subcommittee:

"One half of one per cent of all the currently classified top secret, secret, and confidential deserves such protection. The other 99.5 per cent could easily be made public. The Defense Department has incorrectly imposed all kinds of classification restrictions on the press, its own employees, and government contractors. The basic classification system was originally designed for the very narrow field of military information that could be used by some foreign nation against the United States. Now, however, it's become a way of life, and it's used as a cover-up for all sorts of government inadequacy and failure, and these should rightly be made public."

Arthur Goldberg, former Ambassador to the UN, another witness at the hearings, said:

". . . I have read and prepared countless thousands of classified documents and participated in classifying some of them. In my experience, 75 percent of these never should have been classified in the first place; another 15 per cent quickly outlived the need for secrecy; and only about 10 per cent genuinely required restricted access over any significant period of time."

Among the kinds of items that have been classified are newspaper stories; materials admittedly "unclassified"; and privately owned information, such as patents.

When a newsman asked for a copy of evaluations made by the Veterans Administration of hearing aids, he was told to come back another time; when he did, he was told that the information had been classified and therefore unavailable to him. A researcher who asked the National Achives people for permission to examine documents dating back to 1900–1910 was told that they were stamped "Bureau of Investigation," an agency that no longer exists. What security, you might ask, could be threatened by documents 70 years old?

A page-by-page perusal of the hearings reveals several examples that would be hilarious—if they did not have tragic consequences or implications. You cannot read these volumes of hearings without coming away with a deep conviction that classifications are made far too often on the basis of whim, caprice, and fear; the common denominator being, "When in doubt, classify."

SECRECY DEVICES

In addition to the classifications established by Executive Order 10501 are various secrecy devices invented by government agencies themselves. When I was an information officer for the government, we used such terms as "Confidential," "For Administrative Use Only," and "Restricted" indiscriminately, whenever we wished to award off the evil spirits of the news media. (I must confess, however, at my constant amazement at the effectiveness of such classifications, since they "worked" almost all the time.)

Within State, Defense, and other agencies, we know that a similar category of unofficial classifications is used, as various witnesses testified.

Are all these mountains of classified materials, hordes of classifier, and innumerable classifications necessary? Do we not need some system of protecting information that is vital to the nation's security? Should not some people be empowered to decide what is and what is not suitable for publication?

Very often the answer is given by someone who wants something: a Congressman wanting some "inside" information that will give him a campaign plank or platform (as Communism was in the 1950's); Executive Branch people who want to hide information that could be embarrassing or harmful to them; or a President maneuvering for some diplomatic advantage.

EXECUTIVE PRIVILEGE

Obviously, the power of Congress to investigate is all but unlimited, and is so guaranteed by the Constitution. Yet, it is often threatened by what is known as the "executive privilege." In the striving between the Legislative and Executive

Branches of our government, which is natural in any system of checks and balances, the special pleas from one side or the other must be read in the context of the times and issues. Here, for example, is a passion declaration of the right of Congress to information:

"Now, I am not critizing the reporter for getting the information; that is his job. But I do say that when the time comes that the executive department feels that a particular letter is so confidential that it cannot be disclosed in executive session to a committee of Congress, but that its contents can be bandied about among newspaper reporters, it is certainly high time Congress did something about that situation and got the information to which it was entitled."

And who said that? A young congressman from California, named Richard M. Nixon, on April 22, 1948. It should, of course, be read in the light of current Administration policy and practice.

Let's take a look at "executive privilege." "The power of the executive privilege," said Sam M. Gibbons, congressman from Florida, is "a power that has grown since its first timid pronouncement by President Washington, has gotten to be a tyrannical power, that can destroy this government as sure as an outside force can destroy this government."

William H. Rehnquist, at the time of the hearings an Assistant Attorney General, claimed that the executive privilege is inherently a constitutional power that cannot be touched by congressional action.

Back comes Clark Mollenhoff, veteran newsman who was, for a while, a sort of "ombudsman" in the Nixon White House. He told the subcommittee:

"I think it [executive privilege] is just a political privilege of whatever President happens to be sitting in the White House. If he's got the chips on his side, from a political standpoint, to call a showdown, he will get by with it. If he has not, he better take another look. . . . I don't really know that there is an executive privilege ever upheld by the courts. But there is "political privilege" . . . if the President himself wants to go on record saying, "I am taking these papers to my bosom and I am not giving them to you," then he is entitled to do that and take whatever political consequences there are. We operated on that thesis when I was at the White House."

As Lee White, former chairman of the Federal Power Commission, told the subcommittee, this tension between the Legislative and Executive Branches is a "natural phenomenon," and "this is true regardless of whether both branches are controlled by the same political party "

SCOPE OF EXECUTIVE PRIVILEGE

The hard fact of the matter, frustrating as it may be to many congressmen, is that the power of the Executive Branch has been steadily expanding within recent years at the expense of Congress. President Theodore Roosevelt boasted, "I did greatly increase the power of the executive." Later, the second Roosevelt enlarged upon that power, and so has every successive President.

Even while President Nixon was writing to Congressman Moss, "The scope of executive privilege must be narrowly construed," and that "this Administration is dedicated to insuring a free flow of information to the Congress and the news media," his Administration was preparing a broadening of the "Top Secret" category. Up to that time, the category was almost entirely confined to military secrets and to information which, if disclosed publicly, would lead to a break in diplomatic relations "affecting the defense of the United States." According to Walter Pincus, writing in *The Washington Post* for April 16, 1972, the "Top Secret" definition has been changed to anything that would disrupt "foreign relations." Pincus characterized it as "a phrase so general that it could mean something as vague as embarrassment of a foreign leader over a policy statement such as the Nixon Doctrine."

On whom are the secrecy provisions of Executive Order 10501 binding? One of the main criticisms of the order is its vagueness as to what is covered and to whom it applies. Officials of the government take classified files with them when they leave the service, and then "declassify" them at will when they write their memoirs. Time and again, Lyndon Johnson has broken his own secrecy invocations, sometimes while he was President, oftentimes since he has become a private citizen. Government officials, while still in office, often "leak" classified materials to the press. (It is rumored around Washington that Pentagon officials have become leery of saying to their peers, "Excuse me while I take a leak.")

The entire issue of secrecy in government cuts to the heart of our democratic process. Both Goldberg and Moss commented during the hearings that nothing less than the First Amendment to the Constitution is at stake. Certainly, Congress cannot operate without a relatively free access to information. Even if the Executive Branch were to retain its privilege of secrecy for military and high-level diplomatic discussions and action, there would still be a tremendous flow of information to the Congress that could be very useful for legislative operations.

How much should citizens know? Are the people who run the government so wise and the general public so unwise that the government people can tell us what we may or may not know? Certainly this is quite to the contrary of recent decisions of the Supreme Court, which have broadened the First Amendment so much that David Carliner, a lawyer with the American Civil Liberties Union, recently stated that our freedoms have grown so of late that there isn't much controversy about the First Amendment. And still government secrecy, despite all these decisions, waxes even greater.

The late philosopher-educator, Alexander Meiklejohn, put the issue most eloquently. In his book, *What Does America Mean?*, he wrote:

"The unhindered integrity of the press is one of the highest ideals of our civilization: the Federal government may limit it, may not subordinate it to other purposes. . . . In the field of Religion, Speech, Press, Assemblage, Protest, a government finds itself facing activities which are beyond, above, the level of its authority. It is their servant. It owes them allegiance. In relation to them its one legitimate activity is to see that they are kept free of interference, that no agency, public or private, shall establish control over them. Here the law reads, 'Congress shall make no law, prohibiting . . . or abridging. . . .' There is, I am sure, no human virtue which goes so deeply into the making of a free society as the virtue of truth telling. In its most essential aspects human association is, depends upon, consists of, communication. If, then, men cannot trust the words which they speak or write one to another, the social structure collapses. If men lie we have lost the only stuff of which human companionship can be made. So far as lying prevails, human society does not exist. And the essential sin, it must be remembered, is not in the formal untruthfulness of the statement.

"Many a lie is factually true. The lie which kills human sympathy and cooperation is that which presents a statement as made in the interest of the hearer, when its driving motive and intention is to serve a conflicting interest of the speaker. It is the making a man believe that we are serving him when our intention is that he shall serve us. It is not about 'the facts' but about ourselves that the lie is told. When, by such means as this, we try to 'sell' our nation, our party, our church, our goods, our family, our friends, we are at the same time by the same act destroying the whole scheme of human relations without which nation, party, church, goods, family, friends, would be impossible. We are destroying mutual confidence and respect."

THE FUTURE

Given the need for secrecy in some areas, and complete information in many others, what can be done? A number of congressmen and other political practitioners recommend a joint House-Senate Committee, established by statute, that would review materials for classification, make policy recommending them, including declassification after a stipulated time, and consider the classification problem generally. "We are in an impasse for want of appropriate guidelines," said Arthur Goldberg at the hearings. He argued for "a solid congressional statute" to provide a foundation for Executive Order 10501 and to give guidance to it.

Others doubt that mere mortals could administer such legislation. Said Lee White: "I don't think in this area that the mind of man can come up with rules that will make sense." And ex-security expert Florence:

"Any attempt to revise the Executive Order and to require the type of implementing action that might truly serve the interests of the country would be doomed to failure. The fallibility of men and the self-interest we necessarily exercise in our lives simply rule out any hope that administrative choices made as to classification under a new order would be better for the nation than those being made today. We could easily amend the existing order, but we cannot amend people."

To which I can only rebut: I am glad that Mr. Florence was not able to carry any weight at the Constitutional Convention of 1787. The ability of free men to

make decisions freely is at the crux of this matter. That is what the fight over freedom of information is all about.

And these three volumes tell you more on the vital struggle than you can find anywhere else.

CENTER FOR DEFENSE INFORMATION,
Washington, D.C., August 9, 1973.

Hon. ABE RIBICOFF and Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATORS CHILES AND RIBICOFF: Thank you for your letter of 31 July. My comments are attached.

I will be pleased to talk with you or your staff at any time and expand replies in any areas.

Sincerely,

GENE LA ROCQUE,
Rear Admiral, U.S. Navy (retired), Director.

QUESTIONS AND ANSWERS CONCERNING SECTION 201 OF S. 260

1. Do you agree that requiring all meetings of multimember agencies to be open to the public would increase public confidence in administrative decisionmaking and enhance agency responsiveness? If not, what alternatives would you suggest?

Answer. The opening of all meetings of multimember agencies to the public would undoubtedly increase public confidence in administrative decisionmaking and enhance agency responsiveness. However, it is doubtful whether opening all meetings to the public would be practical. There are many discussions of various solutions to the problems which are largely exploratory in nature. These exploratory, preliminary meetings could well be conducted in private. Alternatives are these:

(*a*) Require all meetings of multimember agencies in which policy *decisions* are made to be open to the public.

(*b*) All exploratory meetings and informal sessions could be conducted in private as long as the *subject* of these meetings is made public prior to the meeting and/or after the meeting.

2. What methods would you suggest to require that meetings of single member agencies, such as EPA, be open to the public?

Answer. It would obviously be impossible for single member agencies, such as EPA, to conduct all of its meetings in public. It would be too cumbersome and would inevitably slow the operation of the daily business of an agency such as EPA to conduct all meetings in public. However, decision meetings could be regularly scheduled once a week or once every two weeks, at which time decisions reached by the agency would be made public with citizens in addition to the press permitted to query the officials of the agency. Single member agencies should also be required at least once a month to hold open forums for interested individuals or groups to present their proposals, recommendations, ideas or dissatisfactions to a senior official.

3. What would be the likely effect of an open meeting requirement on the relation between agencies and (a) the media, and (b) organized interest groups?

Answer. Open meeting requirements of the type indicated in 1 and 2 above would facilitate the work of the public interest groups and assist the agencies in maintaining contact with the public at large. The media would have something to talk and write about.

4. Do you think the open meeting requirement should apply to all agencies as defined in the Administrative Procedure Act or a limited group of specific agencies, such as the independent regulatory commissions?

Answer. All agencies as defined in the Administrative Procedure Act should have provisions for at least some of their meetings to be conducted in public. The problem that besets our regulatory commissions is that they have become so autonomous and generally so disinterested in the general welfare that a sense of frustration has permeated the country on its ability to influence agencies and regulatory commissions.

5. In Section 201(a) the open meeting requirement is defined as applicable to "all meetings . . . at which official action is considered or discussed." This clearly applies to formal meetings; however, there are questions as to its further applicability, e.g., should it apply to informal meetings of less than the entire membership of an agency, or a meeting between subordinates and a member? Should this section be more clearly defined?

Answer. Section 201(a) should be more clearly defined. Because the nature of the work of each organization varies considerably from another, some flexibility should be left to the agency. Each agency should, however, be required to file a statement with the Congress or the appropriate committee indicating what its public meetings policy is. A report of all public meetings should be filed with the Congress on an annual basis.

6. As drafted, S. 260 requires agencies to promulgate regulations implementing these requirements, subject to court review. Do you agree with this provision, or do you feel that approval should be made by the Administrative Conference?

Answer. I agree with S. 260 as written requiring agencies to promulgate regulations implementing these requirements subject to court review.

7. S. 260 exempt from the open meeting requirement the conduct or disposition (but not the initiation) of cases of adjudication subject to the hearing requirements of 5 USC 554(a). Is this exemption desirable?

Answer. I am doing more research on this answer and will submit reply soon.

8. On the other hand, do you feel that agency meetings to initiate adjudicatory proceedings be open to the public? Should there be an exemption for decisions to initiate criminal proceedings? Should the Justice Department be exempt from this provision?

Answer. Agency meetings to initiate adjudicatory proceedings should not be open to the public, but public announcement should be made after the meetings are held. Exemptions for decisions to initiate criminal proceedings should not be allowed. The Justice Department should not be exempted from this provision.

UNIVERSITY OF FLORIDA,
Gainesville, Fla., July 18, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: It is a privilege to comment on S. 260, the Government in the Sunshine Act, in response to the recent invitation by Senator Ribicoff and yourself.

In general, I believe one of today's most urgent needs is to open up the processes of government to public view and, to the extent feasible, public participation. Your efforts in this direction are a significant contribution to progress.

Enclosed are some comments on S. 260, in narrative form, together with answers filled in on the questionnaire forms you sent. Of course this response reflects my own personal views, and should not be attributed to the University or to any other person.

As you know, a new project on governmental accountability is now getting under way at this College of Law. The new project is supported by the Josephine H. McIntosh Foundation, Inc., which has also supported our study of impoundment, now being wound up. The need for openness in government operations is obviously of great concern to the accountability project. I am therefore talking the liberty of passing your letter along to Professor Fletcher Baldwin and Mr. Jon Mills, in case they wish to undertake research on the Sunshine Law within the context of the accountability project.

Please do not hesitate to let me know if I can be of additional assistance.

Sincerely,

L. HAROLD LEVINSON,
Professor of Law.

1. The term "meeting" should be defined

The bill fails to define "meeting." The Florida Sunshine Law also fails to give a definition, and absurd consequences have resulted. Just a few months ago, two members of the five-man Gainesville City Commission had to stand trial for violating the Florida Sunshine Law (a misdemeanor), on the allegation that these two commissioners met for lunch one day and discussed city business without inviting the public to join them at the lunch table. (A jury found the defendants not guilty.) The federal act should not apply to luncheon meetings, but, at the same time, the act should not permit the real decisions to be

made in closed sessions in advance of a rubber-stamp meeting. A suggested definition of "meeting" is as follows:

"For purposes of this Act....

" 'meeting' means any meeting to which all members of the government agency are entitled to be invited, and at which any official business may be taken or proposed official action may be considered or discussed, including any meeting convened for the purpose of conducting a hearing."

2. The act should provide for unexpected developments arising during a meeting

Information of a non-public nature may unexpectedly be offered during a public meeting. Perhaps the chairman has inherent power to adjourn the meeting under such circumstances, pending a new determination as to whether the meeting should be open or closed when it reconvenes. But the act should clarify this point.

3. The exemption of staff, personnel and management matters does not appear to be justifiable, on policy grounds

The exemptions contained in the act, relating to staff, personnel and management matters, do not appear to be justifiable, on policy grounds. The public's right to know seems as great here as elsewhere.

4. The requirement of a list of all persons attending meetings should be limited to closed meetings

The requirement that a list be made of all people attending a meeting, open or closed, seems impractical as applied to open meetings, and does not serve any apparent need. On the other hand, as applied to closed meetings, the requirement is sound.

5. Sec. 201(b)(6) is not clear

Sec. 201(b)(6) provides certain exceptions, by reference to Title 5, U.S. Code, sec. 554(a). The reference is not clear, and neither is the policy which would justify the exceptions apparently intended.

6. Sec. 201(f) should permit written comments from "any person"

Sec. 201(f) permits written comments to be filed with the agency by any "interested person." This right may be vindicated by suit filed by "any citizen or person resident in the United States." This suggests that a person without sufficient interest to submit written comments may have standing to sue.

It may be preferable to strike the word "interested", so as to permit written comments by "any person."

7. Civil fines should be considered as alternative sanctions in Secs. 201(g) and 202(d)

In addition to the remedies provided in Secs. 201(g) and 202(d), serious consideration should be given to imposing civil fines against officials who have wilfully violated the act. The existing remedies may not provide sufficient motivation for compliance by officials. Indeed, officials appear to have nothing to lose except time by violating the act in its present form. And, in situations where an agency is in no

hurry to take action, officials may be tempted to deliberately violate the act. A civil sanction could provide additional inducement to comply.

8. Sec. 202(b) should define "interested person"

The term "interested person" in Sec. 202(b) should be defined, especially as the context suggests the same term is used in two different senses in the very same subsection. The substantive provisions, Sec. 202(b) (1) and (2), prohibit ex parte communications with "interested persons." The remedial provision, sec. 202(c), permits written comments by "interested persons." (And the jurisdictional provision, also in sec. 202(c), authorizes suit by "any citizen or person resident in the United States"—see comment No. 6, above.)

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Washington, D.C., July 27, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: We very much appreciate the letter of July 10 signed by Senator Ribicoff and yourself calling our attention to S. 260, the Federal "Government in the Sunshine Act", and inviting our comment thereon as the same may impact the Rural Electrification Program.

We completely support the concept of transacting government business in public, and welcome those provisions of S. 260 which would open to public view the proceedings of the House and Senate committees and Federal agencies, especially Federal regulatory agencies. Section 202 of the bill does, however, trouble us to some considerable extent.

As we read it, Section 202(a) would amend the Administrative Procedures Act to prohibit ex parte communications between REA and all of its some 1,000 rural electric system borrowers, and between REA officials, the staff of this Association, and all others as to policy decisions of general applicability. In other words, no manager, director or employee of any one of the some 1,000 electric cooperatives now providing electric services in 46 states, and no director or employee of this Association could discuss with REA officials and policy decisions then under consideration by the agency. The same would hold true for the power companies. None of their officials could discuss with REA employees any pending policy decisions, except perhaps through some formalized adversary hearing procedure.

It seems to us that this requirement would serve no useful purpose. Under regulations of the Secretary of Agriculture, REA always publishes its proposed regulations in the *Federal Register*, and solicits comment on them from all interested parties. Moreover, the REA administrator and his staff are constantly discussing with existing borrowers, new loan applicants, NRECA staff, power company officials, local government officials, members of the House and Senate and all manner of interested people, policies under which REA is operating,

pending changes in such policies, and almost anything else that anyone wants to talk about with the Administrator.

Therefore, it seems to us that prohibiting ex parte communications with an agency of this type, which performs mostly a banking function, could accomplish no more than to restrict the flow of information and expression of opinion necessary to judicious resolution of policy problems by the Administrator.

In general terms, it is our suggestion that ex parte communication should not be prohibited as to agencies which are not primarily regulatory in their function, which are designed and intended to carry out a largely proprietary function of government, and which do not promulgate rules of general applicability that are likely to be widely controversial.

We would sincerely appreciate being afforded the opportunity to present oral testimony during any hearings which may be held on this bill.

With highest personal regards, I remain,

Very sincerely yours,

CHARLES A. ROBINSON, Jr.,
Corporate Counsel.

cc: Hon. Abe Ribicoff.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
New York, N.Y., October 29, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: This is a belated response to your letter of September 18 and the earlier letter from you and Senator Ribicoff of July 10, both of which letters enclosed copies of S. 260, the federal "Government in the Sunshine Act," and requested my comments thereon. I very much regret that travel abroad and the press of other business have made impossible an earlier response.

I strongly support the objectives of S. 260 and would be glad to help you and the Subcommittee in any way possible. I particularly agree with the concept underlying Title I of the bill that Congress must open its own proceedings to the public to the maximum extent possible if it is to have any credibility in attacking Executive Branch secrecy. I am equally in agreement with the basic thrust of Title II with respect to both closed meetings and ex parte communications; and for your convenience will organize my comments on these provisions in correlation with the numbered questions attached to the letter of July 10.

Questions Concerning Section 201 of S. 260

Response to Questions 1, 2 and 4.—One of the crises facing the federal government today is a crisis of confidence caused by a rise in cynicism, suspicion and mistrust toward all governmental decisions on the part of the general public. Excessive secrecy is one reason. It produces sensational leaks, false rumors, resentment, a sense of exclusion and an attitude that key government officials are at best patronizing, incompetent or untrusting of the public, and at worst corrupt and undemocratic.

Therefore all government functions should, to the extent practicable, be conducted in open public sessions. Where such open meetings are not possible, government action should be promptly announced in public sessions or released in transcripts, together with an explanation of the reasons for the decision. Except for very limited circumstances where absolute secrecy is necessary, no government action should even be valid unless it is undertaken in a public session or promptly announced in a public forum.

There is no reason, however, why this principle should be limited to multi-member federal agencies (any more than Title I should apply only to Congressional hearings conducted by more than a single Senator or Representative). Today's crisis of confidence caused by excessive secrecy centers primarily upon the Executive departments headed by a single individual, not the administrative agencies. Top executives in these departments, and in the single member administrative agencies outside the Executive departments, often hold decision-making meetings with other officials or information or advice-seeking meetings with outside groups, relating to public policy, property, contracts or funds, that deserve coverage under your bill. Without trying to define here all the kinds of meetings which should be covered, I would hope that the Subcommittee staff could explore this possibility.

Presumably coverage would thus include all agencies as defined in the Administrative Procedure Act. While I have no doubt that some inconvenience and inefficiency would be involved, these would be outweighed by the benefits to the public. If particular agencies or departments have particular problems or situations demanding special attention, these should be dealt with by special regulations, not by a complete exemption from the general open meeting requirement.

Response to Question 3.—The media would on balance appreciate and benefit from an open meeting requirement. At first their personnel might be spread more thinly, with an adverse affect on in depth reporting; but they would soon make a judgment as to which meetings were worth covering, which were charades and which were unnewsworthy. Officials who have antagonized the press by their paucity of press conferences would no longer be able to avoid its eye entirely. No doubt some segments of the press will distort or sensationalize the conduct or results of certain complex or delicate meetings previously shrouded from public view; but this problem, alleviated by improved agency information programs, is always present and tolerable in a free society.

Those organized interest groups which prefer to work in the shadows will both dislike an open meeting requirement and be handicapped by it; but they will surely become accustomed to it over time. Responsible business organizations should have no objection, particularly if regulations and exemptions make it possible for truly confidential information on profits or trade secrets, for example, to remain confidential. Consumer and reform organizations, which now lack the connections or influence needed to obtain private sessions with some agency officials, will greatly benefit from a requirement for open meetings and can be expected to participate frequently. While on occasion their increased participation may cause tensions and discomfort on the part of those agency officials and others who regard them as a nuisance, their increased attendance and the resulting increased

responsiveness on the agency's part will be on the whole healthy developments.

Response to Question 5.—Those seeking to avoid the purpose of this bill upon enactment will no doubt be able to do it through smaller meetings that are supposedly unofficial, informal, spontaneous or accidental. At this time, however, I have no tighter standard to suggest which would be enforceable, realistic and consistent with our rights of free speech, assembly and privacy. It is similarly difficult to cover meetings between officials and their subordinates—many of which are briefings that deserve to occur in open meetings—without denying the degree of privacy required for effective consultation, opinion writing and decision-making. One alternative may be to allow certain types of meetings to be exempted on an ad hoc basis by majority vote of the agency itself. Such an exemption could be modeled on Exemption 5 of the Freedom of Information Act, which, as interpreted by the courts, exempts non-factual portions of internal agency memoranda from public disclosure. See *EPA* v. *Mink*, 410 U.S. 73 (1973).

Response to Question 6.—It is time for the Administrative Conference, which has in the past performed a valuable service of a study and educational nature, to be given certain quasi-legislative functions of general applicability to the administrative process. S. 260 presents an appropriate occasion for such delegation, and the Conference should be delegated authority to review, revise and promulgate the rules of conduct required.

Response to Questions 7 and 8.—The two phases of agency adjudicative proceedings most deserving of confidentiality, in my opinion, are the initiation phase and the decision-making phase. The first, like criminal grand jury proceedings, should be kept private in fairness to the party not yet charged with wrongdoing. Closed sessions for deciding cases and writing opinions are a well established tradition in this country. The "conduct" of adjudicative cases in the intervening stages, however, should not be any more secret than a criminal trial.

As the above makes clear, neither the Justice Department nor any other agency should have a complete exemption from the open meeting requirement; but decisions to initiate criminal prosecution should as a matter of due process be taken in private.

Questions Concerning Section 202 of S. 260

Response to Question 1.—The need for comprehensive, consistent and meaningful regulation of ex parte communications in adjudicative proceedings is one of the strongest arguments for this bill. The lack of useful sanctions and uniformity in the existing regulations on this subject is at the very least potentially scandalous.

Response to Questions 2 and 3.—Rule-making proceedings benefit from all kinds of communications and the entire public is in a sense "party" to such proceedings. Thus the only workable regulation is to require that all written submissions, and written summaries of all oral communications, be placed in the agency file open for public inspection. Such a regulation should definitely apply to proceedings relating to public property, loans, grants, benefits, contracts and environmental impact statements. No distinction should be made between "minor" matters, where the communications are likely to be so infrequent as to cause minimal administrative burdens anyway, and "major" rule-

making proceedings, where public confidence would be enhanced not by a prohibition of ex parte communications but by their regulation in the manner suggested above.

Response to Questions 4 and 5.—Many of the ex parte communications which have been the most improper have come to the concerned agency from the White House or other government departments. No government official or employee should be exempt from these standards, nor should the definition of "interested person" be narrowly drawn. Anyone who communicates with an agency about a pending adjudicative proceeding is in one sense or another "interested." While communications within an agency on procedural matters clearly must be permitted, in general whatever prohibitions or regulations are adopted should operate both ways, i.e. communications from as well as to agency personnel.

Response to Questions 6 and 10.—The provisions of S. 260 regarding the time at which ex parte prohibitions become effective reflect in general the provisions of existing agency regulations. Those provisions do seem "sound and workable" and have not been subject to ineffectiveness through evasion or postponement of formal proceeding until policy issues have already been resolved informally. Such evasion would seem to be covered by the provisions proscribing ex parte communications once an individual knows that a particular proceeding will be noticed for hearing in the future.

Response to Question 7.—This also is an appropriate task for the Administrative Conference. The issues raised are essentially matters of policy for resolution by those with administrative expertise, not legal issues for judicial review.

Response to Question 8.—Congressmen should not be exempted from the ex parte communication rules.

Response to Question 9.—Informal agency decisionmaking, like notice-and-comment rule-making, is not readily susceptible to a proscription on ex parte communications. However, it is entirely feasible to require that any communications from persons outside the agency be reduced to writing with a copy placed in a public file. This requirement, coupled with a requirement that all agency decisions be publicly announced, together with an explanation of the reasons behind the decision, would in many ways "ventilate informal decision-making" and improve the administrative process.

I hope the above is helpful. I congratulate you on your sponorship of this landmark measure and will be glad to be of assistance in any way that I can.

Sincerely,

THEODORE C. SORENSEN.

LAWRENCE LIVERMORE LABORATORY,
Livermore, Calif., August 27, 1973.

HON. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: I remember with pleasure the occasions when I saw you in the past. Now I have received a copy of a bill in

which you have an obvious and great interest. After considerable thought I have prepared some comments which I have sent to Senator Chiles, and of which I am enclosing a copy to you.

I expect that my comments may differ to some extent from ideas which are most popular at the moment. At the same time I believe that these popular ideas, while they contain a considerable portion of truth, also contain some errors. It is not only the privacy of the private individual that must be safeguarded. The privacy of the official in the period before he acts must be equally respected.

At the same time too much sunshine (particularly in the form of television) may turn out to be an improper exaggeration of practices which are perhaps not quite justly called democratic. I do believe that democracy requires openness in the sense that vital information must not be withheld from people for any length of time. Unfortunately, our policy of secrecy does result in a poorly informed public. But the minute-by-minute information which is becoming popular in many respects would eliminate the proper thoughtful approach in decision making.

Hoping that the accompanying comments might be of some use and also hoping to be able to be of some help to you in your new and exciting job,

Sincerely,

EDWARD TELLER.

LAWRENCE LIVERMORE LIBRARY,
Livermore, Calif., August 27, 1973.

HON. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: The "Sunshine" bill is indeed important and it is of great specific interest to me. I have advocated for the past years with increased determination a policy of the greatest possible openness. I hope you will permit me to make some general remarks in order to explain my point of view, and then follow these up by concrete recommendations. These recommendations are related to many of your specific questions, and I believe that it will serve the purpose better if I make such recommendations rather than attempt to answer the specific questions which have been raised.

Dictatorships operate in a maximum of secrecy and permit a minimum of privacy. Our democratic form of life requires the opposite behavior in both fields. We should permit secrecy only when this is required by paramount and indubitable reasons. Unfortunately, the use of secrecy has become much too widespread.

On the other hand, the requirement of openness cannot be extended so far as to interfere with privacy. Indeed privacy is needed not only by the private individual, but also by an official, both in the legislative and the administrative branch, while he is engaged in the deliberations which are to lead to action.

In the recent past, secrecy has unfortunately not been relaxed to any appreciable amount. At the same time there is a tendency to interfere with privacy. In particular, the practice of opening hearings not only to the public, but even to television, has become widely accepted. This

results in a bias where mature deliberation is being replaced by a continuing and continuous appeal to the emotions of the public.

The idea that openness should be symbolized by sunshine has indeed a wide and justified appeal. That openness should be symbolized by television is much more doubtful. For this reason I would like to advise that the Sunshine bill should be substantially modified.

It is indeed reasonable that records should be kept of all Congressional hearings. These hearings should go promptly into a published record, which is indeed the present practice. Thus they become available to those seriously interested.

An exception will have to be made in the relatively few cases where national security requires limitations. In these cases meetings are now held in executive session. I believe that records of these meetings should be kept and eventually published. However, in the interest of national security the publication may have to be delayed. There should be an orderly way in which the publication of such classified matter should occur. I do not believe that an indefinite delay is ever justified.

On the other hand, it does not seem to me essential that Congressional hearings should remain open to the public. The presence of the pubic makes it unavoidable that appeals to the press will interfere with the deliberations of the lawmakers. I have been a witness at many Congressional hearings. I have also participated in many private meetings with senators and congressmen, singly and in groups. The latter meetings proved invariably to be more fruitful. I believe the explanation is that in the former meetings the presence of the public did not permit the full attention of the lawmakers to be focused on the points at issue. Unfortunately, no records were kept of the private meetings. Official hearings where the public is excluded, but where the records are kept and published, would seem to me to unite the advantages of public access with absence of inappropriate bias.

The slightly harmful effects of public hearings are greatly magnified when the hearing is televised. It seems to me that such a measure of openness is in fact no longer properly called openness, and comes dangerously close to the pursuit of sensationalism. I believe that televising of Congressional hearings should be forbidden by law.

At the same time, the open and reasonably prompt availability of the Congressional Record will insure that anybody who is seriously interested can be kept well informed so that Congressional actions will be both understood and can be subjected to conscientious criticism.

In case of the executive branch it seems to me that it is again essential that all deliberations and consultations should be permitted to proceed in privacy. This should hold equally, whether one branch or more branches of the executive happens to be involved.

Public knowledge becomes a necessity as soon as definitive decisions, agreements or policies are formulated. The same holds for information that the Government receives as a result of research or information-gathering carried out by a Government agency. An exception is justified when national security requires the withholding of such information. But information should then be withheld only for a finite period and only when clear justification is given for the withholding of the information. It is desirable that every official should feel the obligation to give out all the definite information that is available, unless quite clearcut reasons exist to behave in a different manner.

In the above discussion I have differentiated between secrecy and privacy. One difference which was implicit in everything I said is the circumstance that secrecy is applied, and in fact too often applied, to end-results, while privacy should safeguard the transitory stage of deliberations. There is another distinction between secrecy and privacy which is of importance because it is a distinction which is capable of clearcut definition.

If a great number of people need to be involved, or informed of an action, the only way to do this without broadcasting is to commit the relevant information to writing. If, in addition, it is important for national security that this information shall not become available to an unfriendly power, it is justified to protect the document that had to be issued, by the procedure of classification.

If, on the other hand, action or discussion is confined to a few people there is no need to issue documents. Private communications can be highly confidential and at the same time can be safeguarded on the basis of proper personal relations. The same holds for notes and memos which have a minimum of circulation. In this case it seems to me not justified to safeguard the information by classification, and by corresponding laws that relate to classification.

In view of what I have said about the distinction between secrecy and privacy, I would like to suggest legislation aimed at a drastic limitation of information protected by secrecy. There are indeed many cases where temporary protection is needed. I know of extremely few cases where a secret that requires the cooperation of many people should be kept or can be kept for more than one year. Therefore, I would like to see legal protection of secrecy applied and enforced for a limited period, for instance, one year. I furthermore would like to see some flexibility which will permit the extension of this protection by secrecy. But any secret that is to be kept for more than one year should require thorough scrutiny whereby I hope to insure that the number of documents to which lasting secrecy applies should not be many millions, as it is now, but only a few thousand.

With such limited application of secrecy one might hope to enforce the secrecy regulations. Today it is unfortunately true that few of the American secrets can be reliably protected from Russian espionage.

One additional reason for the limitation of secrecy is its potential domestic political misuse. If secrecy can be applied only under the most rigorous criteria, then the misuse of secrecy will be effectively stopped.

It is difficult to formulate and to enforce laws which will insure that the public is properly informed, which will exclude the undignified use of publicity and which will protect the small number of secrets which are indeed essential. I am not able to make concrete proposals of legislation which will accomplish all these important purposes. I believe, however, that the "Sunshine" bill in its present form is not likely to bring about badly needed improvements.

I hope that the arguments given in this letter might help to introduce changes in the "Sunshine" bill that will help rather than hinder the difficult process of decision-making in our democracy.

Sincerely,

EDWARD TELLER.

The following letter on S. 260 was sent to various organizations and individuals in July 1973 setting forth specific questions for consideration. Their replies follow this letter.

DEAR SIR: Enclosed is a copy of S. 260, the Federal "Government in the Sunshine Act," of which Senator Lawton Chiles is the chief sponsor and which has been referred to the Subcommittee on Reorganization, Research, and International Organizations for consideration. The bill requires that all meetings of congressional committees and multimember Federal agencies be open to the public, except under certain exemptions.

As the subcommittee is planning to hold hearings in the near future, we want to receive a wide range of opinions concerning this legislation. We would therefore appreciate receiving your views and comments on the provisions of this bill. Specifically, we would like your opinions on the following questions included in your analysis.

QUESTIONS CONCERNING OPEN CONGRESSIONAL COMMITTEE MEETINGS

At present, the rules of the House of Representatives provide that committee meetings shall be open to the public unless a majority of the committee votes to close an individual meeting. The Senate rules provide that a committee may conduct meetings in public if they choose to do so. Several Senate committees have adopted rules providing that meetings of the committee shall be open unless the committee votes otherwise.

1. Do you favor the approach of the House or Senate rules—i.e., should committee meetings be presumptively open unless the committee otherwise provides, or should they be presumptively closed? Why?

2. Will an open meeting requirement impair the quality or speed of legislative decisionmaking? How will the relation between Congress and the media or organized interest groups be affected by such a requirement?

3. S. 260 attempts to limit the grounds, such as national security, on which a committee may properly vote to close a meeting. Do you think it wise to attempt to specify in a statute permissible exemptions from an open meeting requirement or should the decision to close a meeting be left to the discretion of one committee in question? If it is desirable to specify exemptions, do you think that the exemptions provided in S. 260 are sound? Are they too narrow? Too broad?

4. S. 260 provides a method for enforcing the open meeting requirement by creating a Select Committee on Meetings to which would be referred points of order against meetings claimed to be improperly closed provided that the point of order is raised by one-quarter of the members of the committee in question. Do you think that this is a sound and workable procedure? What alternative enforcement procedure, if any, would you recommend?

QUESTIONS RELATING TO SECTION 201 OF S. 260

1. Do you agree that requiring all meetings of multimember agencies to be open to the public would increase public confidence in administrative decisionmaking and enhance agency responsiveness? If not, what alternatives would you suggest?

2. What methods would you suggest to require that meetings of single member agencies, such as EPA, be open to the public?

3. What would be the likely effect of an open meeting requirement on the relation between agencies and (a) the media, and (b) organized interest groups?

4. Do you think the open meeting requirement should apply to all agencies as defined in the Administrative Procedure Act or a limited group of specific agencies, such as the independent regulatory commissions?

5. In Section 201(a) the open meeting requirement is defined as applicable to "all meetings . . . at which official action is considered or discussed." This clearly applies to formal meetings; however, there are questions as to its further applicability, e.g., should it apply to informal meetings of less than the entire membership of an agency, or a meeting between subordinates and a member? Should this section be more clearly defined?

6. As drafted, S. 260 requires agencies to promulgate regulations implementing these requirements, subject to court review. Do you agree with this provision or do you feel that approval should be made by the Administrative Conference?

7. S. 260 exempts from the open meeting requirement the conduct or disposition (but not the initiation) of cases of adjudication subject to the hearing requirements of 5 USC 554(a).

8. On the other hand, do you feel that agency meetings to initiate adjudicatory proceedings be open to the public? Should there be an exception for decisions to initiate criminal proceedings? Should the Justice Department be exempt from this provision?

QUESTIONS RELATING TO SECTION 202 OF S. 260

1. Do you believe it desirable to regulate by statute ex parte communications in cases of agency adjudication required under the Administrative Procedure Act to be decided on the basis of a record established by a hearing?

2. Do you believe it desirable to regulate by statute ex parte communications in cases of agency rulemaking that are subject, under the Administrative Procedure Act, to requirements of public notice and opportunity for comment? If so, should such a prohibition also apply to rulemaking proceedings relating to public property, loans, grants, benefits or contracts within the meaning of 5 USC 553 (a) (2)? Should such a prohibition apply to proceedings to prepare environmental impact statements?

3. Is there a feasible way to differentiate by statutory definition rulemaking proceedings involving major questions of public policy, where a prohibition of ex parte communications might significantly enhance public confidence in the decisional processes of government, from pro-

ceedings involving comparatively minor matters, where the administrative burdens involved might outweight such benefits?

4. As drafted, S. 260 prohibits ex parte communications by "interested persons," including members or employees of other governmental agencies. Should there be a definitional elaboration of who is an "interested person" for purposes of the statute? Should members or employees of other governmental agencies be exempted from one prohibition of ex parte communications?

5. As drafted, S. 260 prohibits ex parte communications from agency members, hearing examiners, or employees to "interested person." Is this prohibition sound and workable? If not, is there a feasible method of deleting it without gravely impairing the effectiveness of the prohibition against ex parte communications from interested "outside" persons to one agency?

6. Are the provisions in subs. 202 regarding the time at which the prohibition against ex parte communications becomes operative sound and workable? Do they, particularly in cases of rulemaking, facilitate evasion of the prohibition? Could you suggest more effective provisions?

7. As drafted, sub. 202 requires that agencies promulgate regulations to implement the prohibition on ex parte communications, subject to court review. Would it be preferable to require that such regulations be approved by the Administrative Conference?

8. Should the prohibition against ex parte communications by an "interested person" apply to inquiries by Congressmen, or should they enjoy a complete or partial exemption from such prohibition?

9. Is there any feasible way that a statutory prohibition against ex parte communications can be applied to informal agency decisionmaking on major policy issues without unduly burdening the agencies? Is there an alternative to prohibition of ex parte communications that might serve to ventilate informal decisionmaking or major policy issues?

10. As drafted, the prohibition against ex parte communications becomes operative at the point where "a proceeding is noticed for hearing or opportunity for participation by interested persons unless the person responsible for the communication has knowledge that it will be noticed, which case said prohibition shall apply at the time of his acquisition of such knowledge." Does this provision offer too great opportunity for circumvention of the Act's requirements by postponing the stage of formal proceedings until major policy issues have already been resolved informally? If so, are there alternative provisions for defining the time at which the prohibition of ex parte communications becomes operative that would narrow the opportunities of circumvention without unduly burdening the agencies?

Your assistance in this matter will be greatly valued by the Subcommittee. We look forward to hearing from you.

Sincerely,

ABE RIBICOFF.
LAWTON CHILES.

GEORGETOWN UNIVERSITY LAW CENTER,
Washington, D.C., July 24, 1973.

Hon. ABE RIBICOFF and Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATORS RIBICOFF AND CHILES: Thank you for the invitation to comment on S. 260, the Federal "Government in the Sunshine Act." I have studied these issues for some time,[1] particularly the relationship of Advisory Committees to the federal agencies, and have participated in the drafting of Washington State Intitiative 276, which is probably the strongest open government legislation now extant.

Let me respond briefly to the questions, leaving any elaboration to a later date:

I. Congressional Committee Meetings

1. Meetings should be presumptively open because that's the way government business ought to be run. Anybody who would close the doors and dispense with a degree of accountability should have the burden.

2. I don't buy the argument that open meetings lead to filibustering, showboating and wheel-spinning. They offer, instead, a rare opportunity for a candid look at how legislators work. Every prediction of disaster is repudiated by actual experience. The media has better reporting opportunities and is less dependent upon the unverified or self-serving leak. The special interests can better extend or withhold their support on the basis of performance, not promise.

3. Quite clearly open meeting exemptions should be explicitly spelled out since unlimited discretion could gobble up vague commitments to accountability. The S. 260 exemptions are too broad since I can't recall a lively congressional hearing that did not charge somebody with "misconduct" or expose somebody else to "obloquy." The trade secret exemption is too generous, particularly since I can recall few other doctrines more thoroughly abused under the Freedom of Information Act. The privacy and national security points are on target.

4. I'd like to think a little more about the enforcement issue. The Select Committee on Meetings is a possibility. Judicial review is another. That's been the preference for enforcing the open meeting obligations of the executive branch.

II. Section 202: Agency Procedures

1. I believe *ex parte* communications in agency adjudication ought to be regulated by statute, both at the adjudicatory and settlement stages.

[1] *E.g.*, articles in 23 Vanderbilt L. Rev. 293 (1970) (on campaign reporting), and 13 Bost. Coll. Ind. & Comm. L. Rev. 719 (1972) (on advisory committees).

2. Same answer as to cases of agency rulemaking. I am aware of several instances of abuse (which I would gladly relate to the committee) in this category. Proceedings involving loans, grants, contracts, *etc.* should be covered and in fact, offer a rarely explored area of government activity. (Virtually all agencies claim exemption under the Advisory Committee Act for committee deliberations on grant applications). *Ex parte* consultation on environmental impact statements is a government-wide epidemic in need of a remedy. Court cases have repudiated agencies making it a practice to regurgitate in the EIS's that which is handed over by their industry clienteles.

3. The problem of the "minor" rulemaking becomes less ominous if you acknowledge remedies other than a total prohibition against *ex parte* communications. Transcribing them and reporting them is another possibility. I tend toward the view that any and all communications to agency officials presumptively ought to be publicly available.

Drawing a statutory line between "major" and "minor" rulemakings for purposes of limits on *ex parte* communications probably can be done, although I'd like to hear more about the "minor" candidates. Surely issues of public health, safety, and environmental quality—where *ex parte* lobbying is rampant—ought not to be exempted.

4. There should be a statutory definition of "interested person" (perhaps drawing on some of the recent standing cases) and it should be very broad. I don't anticipate too many problems in administration. The idea is to keep all communications out when you want to do that or record them all when you want to do that.

Government employees should not be exempted from the *ex parte* limitations. They're often the worst offenders. The committee's hearings should get into interesting territory when they reach such issues as OMB's practical veto power over health, safety and other administrative initiatives.

5. The prohibition runs against not all communications between an agency and an "interested person" (i.e., FCC employees and Bell Telephone) but only to "communications relevant to the merits of the proceeding." I can't offhand think of cases in which this would be administratively untenable. If there are administrative difficulties, the solution is to keep a record of the *ex parte* contacts and their substance. Eliminating the prohibition altogether would invite circumvention since, for example, I've never heard of a telephone conversation that didn't pass information both ways.

6. The *ex parte* rules become operative under section 202 much too late. The FAA, for example, conducts a great deal of its activity through Advance Notices of Proposed Rulemaking and before that, through formal discussions with the carriers and before that, through luncheon discussions with the trade associations. Every line that would be drawn would facilitate a stampede to conduct all serious business before the reporting requirements and *ex parte* bans attach. That's why I would chase the agency back to the beginning and require the reporting of all communications. With that assurance, the limits on *ex parte* discussions can be more meaningfully applied when the formal decision-making is underway, which is what S. 260 anticipates.

7. I prefer judicial review of the regulations on *ex parte* communications (which probably would be limited). The Administrative Conference or other groups (American Law Institute, American Bar Foun-

dation) might undertake to develop model regulations. Everybody, of course, can comment on the proposed rules.

8. Again, we must distinguish between prohibitions against *ex parte* communications and requirements that they be disclosed. In both cases, an inquiry carrying the influence of a congressman should *a fortiori* be banned when the policy calls for no contact and *a fortiori* be disclosed when the policy calls for a complete record.

9. As indicated, a ban on *ex parte* communications on informal decisionmaking is not needed. Require, instead, full disclosure of all correspondence to and from the agency, tape recordings of meetings held within the agency and memos of telephone conversations. Experience with minutes and transcripts under the Federal Advisory Committee Act confirm the feasibility of this policy (I can offer many examples).

10. Any line-drawing on when the *ex parte* rules attach creates opportunities for evasion. All agencies can say (and probably with justification) that "we're constantly discussing regulatory possibilities with our clientele and those range from off-the-wall suggestions to studied drafts." They can say also that it's difficult for anyone to know when and whether a proceeding will reach that final stage of formal notice that gives the public a chance to peak at the tip of the iceberg.

Line drawing is not as important if we can enforce disclosure rules early in the process. On this assumption the draft draws the line in as good a place as any. Another possibility: bring the *ex parte* rules to bear when a proposed rulemaking is reduced to a written draft. The idea is that lawyers can't go very far without writing something down. Once they do, the proceeding should begin and the prohibitions attach.

I look forward to your hearings and applaud the sentiments in S. 260. I would be delighted to participate if you wish.

Yours very truly,

WILLIAM H. RODGERS, Jr.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., October 25, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your letter of August 9, 1973, with which was enclosed a copy of your letter of July 2, 1973, and three questionnaires pertaining to S. 260, the "Government in the Sunshine Act."

The questions and our responses thereto, to the extent that we have special knowledge or other information of possible assistance to the Committee, are enclosed herewith.

Sincerely yours,

ELMER B. STAATS,
Comptroller General of the United States.

COMMENTS ON QUESTIONS PERTAINING TO S. 260

Questions Concerning Open Congressional Committee Meetings

1. Do you favor the approach of the House or Senate rules—i.e., should committee meetings be presumptively open unless the committee otherwise provides, or should they be presumptively closed? Why?

The present House rules as stated in the Questionnaire appear to have the advantage of requiring some affirmative action in order to conduct a closed committee meeting thus reducing the likelihood of an oversight in failing to schedule an open meeting and also of improving the public image and confidence factor.

2. Will an open meeting requirement impair the quality or speed legislative decisionmaking? How will the relation between Congress and the media or organized interest groups be affected by such a requirement?

An open meeting requirement may tend to slow the decisionmaking process with perhaps some improvement in the quality of the decisions reached. Any increase in public confidence in and acceptance of decisions reached through open meetings may be more important than any possible improvement in the quality of the decisions reached. Open meetings might enable the media to provide more information on the pros and cons on the issues involved in proposed legislation. In our opinion an open meeting requirement would not impair the relationship between the Congress and organized interest groups.

3. S. 260 attempts to limit the grounds, such as national security, on which a committee may properly vote to close a meeting? Do you think it wise to attempt to specify in a statute permissible exemptions from an open meeting requirement or should the decision to close a meeting be left to the discretion of one committee in question? If it is desirable to specify exemptions, do you think that the exemptions provided in S. 260 are sound? Are they too narrow? Too broad?

We believe that the inclusion of criteria for permissible exemptions from an open meeting requirement is desirable in the interest of uniform application of such a requirement. Although some problems of interpretation may arise, particularly with respect to the exemption relating to trade secrets and financial or commercial information, the exemptions provided in S. 260 appear to be generally reasonable.

4. S. 260 provides a method for enforcing the open meeting requirement by creating a Select Committee on Meetings to which would be referred points of order against meetings claimed to be improperly closed provided that the point of order is raised by one-quarter of the members of the committee in question. Do you think that this is a sound and workable procedure? What alternative enforcement procedures, if any, would you recommend?

No comment.

Questions concerning Section 201 of S. 260

1. Do you agree that requiring all meetings of multimember agencies to be open to the public would increase public confidence in administrative decisionmaking and enhance agency responsiveness? If not, what alternatives would you suggest?

Yes.

2. What methods would you suggest to require that meetings of single member agencies, such as EPA, be open to the public?

The rulemaking procedures prescribed by section 553 of title 5 afford interested parties an opportunity to express their views. Also

Recommendation 72–5 (dated December 14, 1972), of the Administrative Conference of the United States should be considered in connection with this question.

3. What would be the likely effect of an open meeting requirement on the relation between agencies and (a) the media, and (b) organized interest groups?

An open meeting requirement by affording the media an earlier opportunity to cover agency activities, may tend to increase such coverage. We have no comment on the effect on organized interest groups.

4. Do you think the open meeting requirement should apply to all agencies as defined in the Administrative Procedure Act or a limited group of specific agencies, such as the independent regulatory commissions?

The views of the Administrative Conference of the United States as expressed in Recommendation 72–5 should be considered in connection with this question.

*5. In Section 201(a) the open meeting requirement is defined as applicable to "all meetings * * * at which official action is considered or discussed." This clearly applies to formal meetings; however, there are questions as to its further applicability, e.g., should it apply to informal meetings of less than the entire membership of an agency, or a meeting between subordinates and a member? Should this section be more clearly defined?*

Section 201(a), as presently drafted, does not include definitions for the words "meetings" and "official action." Six exceptions to the general rule are included in section 201(b) with exception (2) relating solely to "internal agency office management and procedures" of any agency. In the absence of definitions and specific guidelines, falling within the exceptions, the bill becomes subject to an interpretation which could impede the conduct of official business by the agency without furthering the purpose of the bill.

6. As drafted, S. 260 requires agencies to promulgate regulations implementing these requirements, subject to court review. Do you agree with this provision or do you feel that approval should be made by the Administrative Conference?

It would be appropriate for the Administrative Conference to approve the regulations promulgated by the agencies and thus act as the first level of review and appeal. After action by the Administrative Conference authority to institute a proceeding in the United States Court of Appeals for the District of Columbia Circuit would not be inappropriate as an appellate channel for review of regulations approved by the conference.

7. S. 260 exempts from the open meeting requirement the conduct or disposition (but not the initiation) of cases of adjudication subject to the hearing requirements of 5 U.S.C. 554(a). Is this exemption desirable?

No comment.

8. On the other hand, do you feel that agency meetings to initiate adjudicatory proceedings be open to the public? Should there be an

exemption for decisions to initiate criminal proceedings? Should the Justice Department be exempt from this provision?

If the meeting is for the purpose of deciding whether to initiate adjudicatory proceedings, it is our view the meeting should be closed, otherwise in some cases there may be damage to a person's reputation if the decision is not to initiate such proceedings.

Questions Relating to Section 202 of S. 260

1. Do you believe it desirable to regulate by statute ex parte communications in cases of agency adjudication required under the Administrative Procedure Act to be decided on the basis of a record established by a hearing?

Yes. We believe that ex parte communications should be made "on the record" rather than "off the record."

2. Do you believe it desirable to regulate by statute ex parte communications in cases of agency rulemaking that are subject, under the Administrative Procedure Act, to requirements of public notice and opportunity for comment? If so, should such a prohibition also apply to rulemaking proceedings relating to public property, loans, grants, benefits or contracts within the meaning of 5 U.S.C. 553(a)(2)? Should such a prohibition apply to proceedings to prepare environmental impact statements?

Yes to all three questions.

3. Is there a feasible way to differentiate by statutory definition rulemaking proceedings involving major questions of public policy, where a prohibition of ex parte communications might significantly enhance public confidence in the decisional processes of government, from proceedings involving comparatively minor matters, where the administrative burdens involved might outweigh such benefits?

We have no suggestions to offer for differentiating between major questions of public policy and comparatively minor matters.

4. As drafted, S. 260 prohibits ex parte communications by "interested persons," including members or employees of other governmental agencies. Should there be a definitional elaboration of who is an "interested person" for purposes of the statute? Should members or employees of other governmental agencies be exempted from prohibition of ex parte communications?

We doubt that it would be practical to develop a meaningful definition of an "interested person" for purposes of the statute. In our opinion no person should make an ex parte communication relevant to the events in an agency proceeding to any member of the agency involved, to the hearing examiner, or to any employee, who is involved in the decisional process of such proceeding. We see no reason to grant a general exemption to members or employees of other governmental agencies in that their views should ordinarily be available to the public. Further, the Government may be an interested party in such matters as transportation rate cases, airmail fares, and transportation route awards.

5. As drafted, S. 260 prohibits ex parte communications from agency members, hearing examiners, or "interested person." Is this prohibi-

tion sound and workable? If not, is there a feasible method of deleting it without gravely impairing the effectiveness of the prohibition against ex parte communications from interested "outside" persons to one agency?

See comments on question 4.

6. Are the provisions in subsection 202 regarding the time at which the prohibition against ex parte communications becomes operative (beginning at p. 26, l.12) sound and workable? Do they, particularly in cases of rulemaking, facilitate evasion of the prohibition? Could you suggest more effective provisions?

We are not familiar enough with current practices to know whether evasion of the prohibition may be a problem or, if it is, how to solve it. It would seem that the burden would fall on agency officials to know when a communication is infringing on something that may come before the agency and to take appropriate action.

7. As drafted, subsection 202 requires that agencies promulgate regulations to implement the prohibition on ex parte communications, subject to court review. Would it be preferable to require that such regulations be approved by the Administrative Conference?

Yes. See comment to question 6 concerning section 201 of S. 260.

8. Should the prohibition against ex parte communications by an "interested person" apply to inquiries by Congressmen, or should they enjoy a complete or partial exemption from such prohibition?

We believe that the prohibition against ex parte communication should apply to members of the legislative branch as well as to the executive branch and other interested persons.

9. Is there any feasible way that a stautory prohibition against ex parte communications can be applied to informal agency decisionmaking on major policy issues without unduly burdening the agencies? Is there an alternative to prohibition of ex parte communications that might serve to ventilate informal decisionmaking or major policy issues?

Because of the nature of informal procedures they do not lend themselves to statutory control, except in very general terms. We have no suggestions as to a practical way of making the prohibition against ex parte communications applicable to informal agency decisionmaking nor do we have any alternatives to suggest.

10. As drafted, the prohibition against ex parte communications becomes operative at the point where "a proceeding is noticed for hearing or opportunity for participation by interested persons unless the person responsible for the communication has knowledge that it will be noticed, in which case said prohibition shall apply at the time of his acquisition of such knowledge." Does this provision offer too great an opportunity for circumvention of the Act's requirements by postponing the stage of formal proceedings until major policy issues have already been resolved informally? If so, are there alternative provisions for defining the time at which the prohibition of ex parte communications becomes operative that would narrow the opportunities circumvention without unduly burdening the agencies?

The provision in the draft bill (page 26, line 12) for designating the point at which the prohibition against ex parte communications would become applicable appears to be reasonably definitive and, hence, provides a practical basis for identifying cases of noncompliance.

DEMOCRATIC NATIONAL COMMITTEE,
Washington, D.C., August 17, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR: In response to your recent letter concerning S. 260, the Federal "Government in the Sunshine Act," I would like to refer you to the enclosed section of the 1972 Democratic Platform which addresses itself to the question of secrecy in government. I believe this clearly defines the position the Democratic Party has taken.

With best wishes.

Sincerely,

ROBERT S. STRAUSS,
Chairman.

cc: Hon. Lawton Chiles.

EXCERPT FROM THE 1972 DEMOCRATIC PLATFORM

SECRECY

Public business should be transacted publicly, except when national security might be jeopardized.

To combat secrecy in government, we call on the Democratic Members of Congress and state legislatures to:

Enact "open meetings" legislation, barring the practice of conducting the public business behind closed doors. This should include so-called mark-up sessions by legislative committees, but should allow for exceptions involving national security and invasions of privacy. To the extent possible, the same principle should apply to the Executive Branch;

Assure that all committee and floor votes are taken in open session, recorded individually for each legislator; record caucus votes, and make all of these votes available to the public;

Urge reservation of executive privilege for the President alone;

Urge that the judgment in the U.S. Senate in a contested election case be rendered in open Senate session;

Immediately strengthen the Federal Freedom of Information Act. Congress should improve its oversight of Executive secrecy by requiring federal agencies to report annually on every refusal to grant information requested under the Act. Citizens should have full recourse to the courts to deal with violation or circumvention of the Act. It should be amended to allow courts to review the reasonableness of a claim of executive privilege; and

Administer the security system so as to limit the number of officials who can make a document secret, and provide for frequent declassification of documents. Congress should be given the means to obtain documents necessary to fulfill its responsibilities.

We also call on the Democratic Members of the House of Representatives to take action through their caucus to end the "closed rule," which is used to prevent amendments and votes on vital tax matters and other important issues, and we call on the Democratic Members of the Senate to liberalize the cloture rule, which is used to prevent votes in that body, so that after full and extensive debate majority rule can prevail.

The following letter on S. 260 was sent to members of the media on July 2, 1973, requesting their views. Their replies follow this letter.

DEAR SIR: Enclosed is a copy of S. 260, the Federal "Government in the Sunshine Act," of which Senator Lawton Chiles is the chief sponsor and which has been referred to the Subcommittee on Reorganization, Research, and International Organizations for consideration. The bill requires that all meetings of congressional committees and multimember Federal agencies be open to the public, except under certain exemptions.

As the subcommittee is planning to hold hearings in the near future, we want to receive a wide range of opinions concerning this legislation. We would therefore appreciate receiving your views and comments on the provisions of this bill. Specifically, we would like your opinions on the need, if any, for such a reform; and if so, how would this change your working relationship with Congress and government agencies.

Your assistance in this matter will be greatly valued by the subcommittee. We look forward to hearing from you.

Sincerely,

ABE RIBICOFF.
LAWTON CHILES.

MINNEAPOLIS TRIBUNE,
Minneapolis, Minn., July 20, 1973.

Hon. ABE RIBICOFF and Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF AND SENATOR CHILES: Otto Silha, President of the Star and Tribune Company, has asked me to reply to your letter soliciting comment on S. 260, the "Government in the Sunshine Act."

Although I have been away from Washington for a little more than a year, my prior experience as a Washington correspondent—just under 18 years in all—has left me with the conviction that the basic objectives of this proposed legislation are completely sound. We have labored here for some time to persuade our own state legislature to pass, and in this past session to improve, an open-government statute. I have the impression that the existing Federal freedom-of-information law is *not* adequate—and in addition that its provisions apply primarily to records and documents, rather than to "live" proceedings.

Although there has been substantial improvement in Congressional practices, there is plenty of room for improvement in the operations of other branches of government. And, I am sure, there is room for some improvement in Congressional proceedings too.

I think you could obtain more useful specific comment on this particular bill from newspapermen who are actually working day-to-day in Washington. I am sure you are soliciting such comment, but I might suggest that our own Washington Bureau, headed by Frank Wright, would be glad to offer comments if you want to seek them. And I suspect that the heads of a number of other Bureaus would be glad to cooperate.

If you succeed in opening more meetings of government bodies to the public, the news media will have to apply additional manpower to cover such meetings. But that's *our* problem—and one we ought to be glad to have.

If I can be of further help, please let me know.

Sincerely,

CHARLES W. BAILEY,
Editor.

THE DAILY SUN,
Texas City, Tex., July 16, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR: I appreciate your letter asking my opinion of the "Sunshine Act" and what my thoughts are on reform legislation of this kind.

Here in Texas we are preparing to revise the State Constitution, and one of the provisions many newsmen would like to see written into the

new document is the right of the public to know what is going on at all local and state governmental meetings. To conduct meetings behind closed doors is to say it is none of the people's business. I like the "Sunshine Act."

When I first got into it, I was apprehensive because of the exceptions listed under "Open Senate Committee Meetings." There was that vague and totally familiar catch-all term, "national security." How many times has that been used to cover poor management, bungling and who knows what else. However, as I read on, it became apparent that the bill does provide the machinery to open the doors of meetings that shouldn't be closed, that newsmen will be told why certain meetings are closed to the public and why particular bits of information are striken from transcripts of closed meetings.

Section (e) is especially gratifying to me as a newsman because it allows a means of examining the conduct of a closed meeting and those who took part in it—by the majority and minority party leaders.

I like section (g) in Title II—Agency Procedures, whereby a citizen has the ability to question a closed door session by going to a District Court for relief. Financial cost of bringing such action, as explained in section (h), is fair.

All in all, this appears to be a good piece of legislation. I will pass copies of it on to my colleagues who have not seen it.

I'm sure you have sent a copy of the bill to John Finnegan of the St. Paul Dispatch-Pioneer Press. He is the chairman of the Associated Press Managing Editors' Freedom of Information Committee, of which I am a regional director, covering Texas, New Mexico and Arkansas.

Sincerely,

JOHN BALIONE,
Managing Editor.

LAS VEGAS OPTIC,
Las Vegas, N. Mex., July 6, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: I am most grateful to you for sending me a copy of the Government in the Sunshine Act (S. 260).

We in the newspaper business have long awaited such action and will help in any way we can to assure its passage. Most of us feel strongly that all meetings of Congressional committees and federal agencies should be open to the public. We believe that our own responsibilities lie primarily with the public's right to know.

While I feel that this particular act contains too many loopholes, it does represent a step forward that should be important to the people. I do question Sec. 133C–(C) (A separate vote of the committee shall be taken with respect to each committee or subcommittee meeting that is closed to the public . . . and the committee shall make available within one day of such meeting, a written explanation . . . etc.) and Sec. 133D–(a)(3) (will tend to charge with crime or misconduct or to disgrace, injure the professional standing or otherwise expose to

public contempt or obloquy any individual, etc.). However, I find the intent of the act good.

In spite of its drawbacks, I believe the advantage of letting "sunshine" into the government far outweight the disadvantages, and perhaps this act is the most effective way to do that. I would like to see a stronger law without these loopholes but will certainly endorse any act that moves toward less secrecy in government.

Very truly yours,

LOIS BECK (MRS. STUART R.),
Optic Editor.

cc: Abe Ribicoff.

MONTGOMERY PUBLISHING CO.,
Fort Washington, Pa., July 17, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: Thanks very much for seeking our comments about S. 260, the "Government in the Sunshine Act," which has been referred to the Subcommittee on Reorganization, Research and International Organizations.

There is no doubt that such a law is needed. It is stating the obvious to say that public business should be conducted in public, but too few Congressional Committees and Federal agencies recognize the fundamental right of voters to understand not only what actions are taken by Government officials—but to understand as well *why* these actions are taken.

Our newspapers are not large enough to support a staff in Washington, but we are members of the Associated Press and we publish the views of several syndicated Washington columnists. Open meetings, by providing easier access to information for wire service reporters and syndicated columnists, would directly benefit our readers. Further, the Federal "Government in the Sunshine Act" would provide an outstanding example at the Federal level for State, county and local governments to follow.

The Pennsylvania House of Representatives early this year voted to open most of its committee meetings, and I am enclosing a statement we published by the House Majority Leader, Robert J. Butera, which explains that this procedure has been a step toward better government. On the same page are columns and an editorial which further discuss the need for a free flow of information from Government to the public.

Our state House of Representatives also is considering a new open meeting law for all state, county and local government agencies which would greatly strengthen the Pennsylvania open meeting law of 1957. I am enclosing a copy of this bill, H.B. 124,[1] for your information.

As immediate past president of the Pennsylvania Society of Newspaper Editors and a member of the National Newspaper Association's Freedom of Information Committee, I have had the opportunity to

[1] See p. 46.

hear the views of many newspaper editors on the subject of open meetings. There is a clear consensus that closed meetings or executive sessions are used to excess at all levels of government.

I would strongly urge your Subcommittee to give favorable consideration to S. 260 as a major step to let Congress communicate better with a public that has grown increasingly skeptical of its government. I would also encourage you to review the exemptions to open meetings permitted by S. 260 to make certain they are not so broad as to negate much of the benefit this law would offer.

We appreciate the opportunity to comment on S. 260. If we can provide any further information or if ever we may be of any service to you, please do not hesitate to get in touch with me.

Sincerely,

FRED D. BEHRINGER,
Executive Editor.

[From Today's Post, King of Prussia, Pa., Mar. 27, 1973]

OPENNESS COMES TO HARRISBURG

(By Robert J. Butera)

(Editor's note: Robert J. Butera (R-150th District), new Majority Leader in the Pennsylvania House of Representatives, has been instrumental in opening committee meetings in the legislature and is a cosponsor of House Bill 124 which would bring more openness to all governmental meetings in the state. He is a lawyer and a resident of Norristown.)

In January of this year the House adopted the following rule: "All meetings at which formal action is taken by a standing committee or subcommittee shall be open to the public. . . ."

This one rule change is the most significant action which the Legislature has taken in generations to revise its internal operation. It requires that the public and-or the press be admitted to review the proceedings at any committee meeting. Although the system has only been in operation since the latter part of January, 1973, our experience to date indicates that the advantages of an open system far outweigh any existing or prospective disadvantages.

In the past, all committee sessions in the House of Representatives were closed to the public and the press unless the committee chairman decided otherwise. This policy, more than any other, relegated the committee system to a rubber-stamp operation. It resulted in the committees being controlled by a few politicians: the Governor, the legislative leadership, or special interest groups.

Legislation which passed through a closed committee system too often received little or no thoughful deliberation. Thus, a bill received its first close scrutiny after it was reported to the Floor of the House by a committee.

The accusations that the Legislature operates inefficiently and is too large a body emanated from this fact: since the committee system did not properly screen legislation, the entire body of 203 members had to do the initial analyzation of legislation and, in effect, act as a committee. It is obvious that 203 people do a less efficient job in the initial scrutiny of legislation than a committee of 23 members.

The fact that the pay of the average member of the Legislature was between $7,000 and $9,000 also worked against a valid committee system. It was difficult under the old closed system for a committee chairman to insist upon attendance since he sympathized with a member's having to earn a living at home.

We have found that the new rule has done infinitely more than merely give the Legislature a slightly better public image. The attitude of the members has been improved greatly because they now know that a committee meeting will be a meaningful one and they will not be called upon to rubber-stamp a bill for submission to the Floor. They can no longer be controlled by a few powerful politicians. Their service will no longer be demeaning.

Under the "open" system, the members and the committee chairmen are better prepared because of the possibility of being misquoted or ridiculed by the press on a particular issue before the committee. The participation by the members has increased dramatically, as has the amount of study required of legislation.

Most importantly, legislation being released by a committee, after receiving the kind of action which the open committee system dictates, is better prepared for Floor debate. In the past, Floor debate became bogged down by a need to clarify language or to make other editorial changes in a bill. Today, when a bill is released to the Floor, most of the defects have been removed and the philosophy of the particular piece of legislation is the only thing to debate.

There are some defects in this system which naturally accompany the opening up of committees. We have noticed a dramatic slowing of the legislative process since bills cannot be forced out of committee at the whim of a few. Therefore, our session has gotten off to a fairly slow start, which is disappointing to me.

However, when I analyze the reason for it—that there is more time being spent in the study of legislation—I do not become overly concerned. There is also the risk of grandstanding since the remarks made at a committee session may be reported in the media.

In summary, the open committee system has my heartiest endorsement. I believe that this act, more than any other, will stand the test of time and will be the strongest catalyst toward making the work product of the Legislature far superior to that of the past.

[From Today's Post, King of Prussia, Pa., Mar. 27, 1973]

Press Freedom Is Your Freedom

(By Fred D. Behringer)

Whatever happened to the First Amendment?

The freedom of the press provided by the First Amendment to our Constitution has never been needed more, yet it may never have meant less.

And you—the voters and taxpayers—don't seem to care.

You may ask, "Why should I care about freedom of the press?" The answer is very simple: Because it's really your freedom that's disappearing.

That's right. The freedom of the press is really your freedom. The idea is not to let newspapers do what they please. Rather it is to guarantee that the press is free to gather and disseminate information so everyone will know what is going on.

YOUR PROTECTION

Hence the term "public's right to know." The more the public knows about government and law enforcement officials, the better it can judge their performance. And the more these officials are exposed to public scrutiny, the better they will perform.

So when the press worries about what we have been calling an erosion of First Amendment freedoms, we are worrying about an erosion of your own right to know. And developments starting with a U.S. Supreme Court decision last June have given us many reasons to worry.

The Supreme Court, in what has become known as the Caldwell case, ruled that Earl Caldwell of the New York Times and two other reporters did not have the legal right to refuse to give confidential source information to grand juries.

The court invited Congress to legislate in this area, and today both House and Senate are considering many bills which would give some form of protection to reporters' confidential sources.

Meanwhile, several newsmen have gone to jail rather than testify, and there has been an alarming increase in the number of subpenas issued to reporters.

MUST BE ABSOLUTE

Most newspaper people assumed, before the Caldwell decision, that the First Amendment afforded protection of sources without qualification. We feel this absolute protection is necessary so that sources can come forward in confidence with information about alleged criminal activity.

Many of the proposed laws, such as those offered by Pennsylvania Senator Richard Schweiker and Congressman Lawrence Coughlin, would provide a qualified protection, and this may be worse than no law at all.

While the controversy over protection of sources is the most talked about pressure on the press, there are others just as disturbing.

Proposed federal rules of evidence, for instance, would compound the confidential source question. They preserve the lawyer-client, husband-wife, clergyman-parishioner immunity from testifying, but not reporter-source.

Last week's Pennsylvania Supreme Court gag on pre-trial statements by police is another example. The decision, in effect, removes from the public record information about an accused person's prior charges and convictions. Police already have shown a reluctance to release information they gave routinely before the court rule.

Then there is the attitude toward information which seems to pervade the Nixon administration to the point that Congress itself complains of being in the dark.

NEW LAWS NEEDED

In an overall atmosphere of secrecy, the Pennsylvania House of Representatives deserves special praise for its efforts toward open information (which are related on this page by Majority Leader Robert Butera).

Pennsylvania has laws designed to make government act in public and to make government records open to the public, but both are too weak to be effective. New, stronger laws are in the works.

House Bill 124, now in state government committee, would curb closed meetings, force public discussion before key votes and stiffen the penalty for violation. A revised open record measure, yet to be introduced, would make rountine police information, such as the fact a crime has occurred, available to the public.

These legislative efforts need your active support. So does the whole effort to keep public information flowing to the public.

Once again, it is your information the press is fighting for. We know you need it, but sometimes we wonder if you really want it.

[From Today's Post, King of Prussia, Pa., Mar. 27, 1973]

LEGISLATURE COMBATS SECRECY, WHILE COURTS MUZZLE PRESS

(By Fred Groshens)

How much right does the public have to know?

Not much, said the Pennsylvania Supreme Court last week in a ruling ostensibly designed to protect the rights of a defendant in a criminal trial.

Much more than it has been told, according to growing sentiment in the Pennsylvania State Legislature.

If you get the idea that the two branches of the government of Pennsylvania are working at cross purposes, you're right.

While the state's top court last week clamped down severely on the amount of information law enforcement officials may reveal about a crime and an accused, the House of Representatives wrestles with legislation that would blow the whistle on the secrecy that has largely shrouded government in Pennsylvania for a century.

Deliberations of a House committee on a bill that would pry open for public view virtually all forms of government follows earlier House action that opened its committee meetings to press coverage.

ABUSE OF PRIVILEGE

There is no doubt that over the years both law enforcement officials and the press have overkilled their right to discuss a crime and an accused. But there is also no doubt that the new ruling affords a defendant more than reasonable protection from public scrutiny. The ruling amounts to a muzzle—nothing less.

But unhappily, abuse of privilege (by some segments of the press and some law enforcement agencies) often leads to another abuse of privilege (this time by the state high court).

For too many years, however, government at all levels across the commonwealth have functioned above and beyond the eyes and ears of the press and public. Only in recent years has the citizenry begun to show interest in what government at the local, county and state level is doing—and in some cases not doing.

SUBURBAN AWAKENING

This new awareness of government was spawned in the suburbs, largely because it is the suburbs where growth is violently altering the landscape and government is reaching deeper and deeper into the pockets of the taxpayer.

Legislative leaders are hopeful that the open meeting bill will become the law of the commonwealth, in spite of opposition forming against it, and that government will be brought more into the spotlight of public scrutiny. But merely casting light into a sometimes dark corner will not make government the example of purity and honesty we all seek. It will require constant attention by both the taxpayer on the back street and the press.

But somehow it seems ironic in this era of enlightenment that the courts should arbitrarily turn off one light while the legislature is struggling to turn on another.

[From Today's Post, King of Prussia, Pa., Mar. 27, 1973]

EDITORIAL—"IT'S YOUR FIGHT TOO . . ."

Freedom of the press is a cornerstone of our liberty, but the government sworn to uphold it is chipping away at the foundation. This is not as surprising as it is regrettable and dangerous. Freedom of the press is always threatened by the instinct of government to draw a cloak over itself, and is often the first casualty of a totalitarian takeover. It can't happen here, we say, with our freedoms clearly defined, but the atmosphere is becoming increasingly oppressive—which is why we are devoting this page to a problem that is just as much yours as ours.

The issue basically is your right in a free government to know what every agency of it is doing—from local to federal levels. The fight to protect that right is your fight, but what is particularly disconcerting about current attacks on that right is the public indifference—and even approval—that has greeted them.

From recent court rulings aimed at suppressing the right of the press—and the people—to legitimate information, to the popular practice of secrecy in government meetings, the implication is clear—that government would prefer to control what the people hear. The proper role of a free press though is to provide a check on government, and we can only shudder to think what might go on without it. We have plenty of grim examples around the world.

The great danger is that government—and the courts—can deny the public's right to know, by direct order and intimidation. The reporters thrown into jail in the past few months for refusing to reveal news sources threatens the rightful access of the people to that news. Court orders which muzzle the police and government officials not only deny the public information they are entitled to but invite their distrust. And with the credibility gaps and secrecy driving a wedge between government and the people, our leaders must realize that openness is the only way to regain public confidence.

Fortunately there is some enlightenment coming out of Harrisburg, as articles on this page indicate, although a bill which would guarantee more openness in local government is running into some opposition. The encouraging signs however, are still overshadowed by the open hostility towards press freedom—and the public attitude that seems to think it is a good idea.

The press may not be a perfect hero. But we need to understand that its freedom is essential to our own freedom, and that reporters thrown into jail are not the only victims of an ominous atmosphere of suppression. Ultimately, we are all victims.

FORT WORTH STAR-TELEGRAM,
Fort Worth, Tex., July 11, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR: Enclosed is a copy of an editorial which I hope answers all of your questions concerning the proposed "Government in the Sunshine Act."

I hope Senator Chiles' efforts are successful.

Sincerely,

JACK BUTLER, *Editor.*

[Editorial from the Fort Worth Star-Telegram, July 11, 1973]

MEASURE PUSHES OPEN GOVERNMENT

A new bi-partisan effort has been launched to bring the decision-making processes of government more into the open, thus helping to restore public confidence in the American system.

Legislation introduced by Sen. Lawton Chiles, D–Fla., is perhaps the most promising vehicle for the movement. Called the "Government in the Sunshine Act," the measure (S. 260) has strong co-sponsorship from both Democrats and Republicans.

Its purpose is identical to that of a bill introduced by Senator Chiles late in the last session of Congress. But it goes even further than that first-draft measure to assure that meetings of congressional committees and government agencies will be open to interested persons and that the public and news media will have access to information on their deliberations and decisions.

Under the bill, meetings of all standing, select or special committees or subcommittees of the House and Senate would be open, except for certain exemptions.

The same open meeting requirements would be imposed on all conference committee meetings.

Meetings of all multi-member federal agencies at which official action is considered or discussed also would normally be open.

Only if a majority of committee members—or of the entire membership of the agency, in the case of federal agencies—voted that matters to be discussed fell within one of the exemptions specified in the bill could a meeting be held in secret.

Even then, there are safeguards against unnecessary secrecy.

The exemptions themselves are reasonably narrow. They would protect the national security, as strictly defined in the measure. They would protect individuals from defamation or unwarranted invasions of privacy. Sensitive law enforcement investigations and "trade secrets" obtained by the federal government on a confidential basis also would be kept under wraps.

One-fourth of the members of a committee could challenge the closing of a meeting by raising a point of order. This would be referred to a select committee and its ruling would be subject to a vote of the entire House or Senate.

The closing of an agency meeting could be challenged by any person in a court action.

Committees and agencies would be required to keep transcripts of all meetings, open or closed, and to make them publicly available except for portions falling within the specific exemptions.

Another important feature of the bill requires that normally the beginning of meetings, open or closed, be announced at least seven days in advance. This would give interested individuals or groups and news media representatives opportunity to plan to attend or otherwise monitor the proceedings.

The bill appears to be a marked improvement over various other efforts to place governmental processes more in the glare of public scrutiny.

Earlier this year, the House adopted anti-secrecy rules. But exemptions were so broad that the result, according to a recent survey by the citizens' lobby Common Cause, has been continuation of a high proportion of closed-door meetings on matters of deep public concern.

Besides, the Senate did not concur in the rules and conference committees, where many vital matters affecting the public are decided, were left out entirely.

Sen. Robert T. Stafford, R-Vt., in remarks supporting S. 260, voiced our sentiments on the subject when he said: "Too much of our activity is carried on in shadows that block the view of the public, but which build the suspicion of the public. I think we should eliminate those shadows with the bright light of public disclosure."

The "Government in the Sunshine Act" promises to banish a lot of those shadows, and we hope it will be enacted without delay.

NEW MEXICO STATE UNIVERSITY,
Las Cruces, N. Mex., July 6, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: I have received and studied a copy of S. 260, of which I understand you are the chief sponsor, and must commend you on your foresight in sponsoring such vital legislation at a time when public confidence in government decision making may well be at an all-time low.

As I am sure you must know, many members of the press have been less than pleased with the application of the Freedom of Information Act of 1970. While agencies have, in the main, conformed to the specifications of this act, many have allowed so much time to elapse between the request for information and the production of such information as to make the information virtually useless to the press or public. Additionally, the act has the limitation of "loopholes" which prevent certain information from being disclosed at all. For example, section 552(b)(7) of this act precludes the disclosure of documents compiled as investigatory files and used for law enforcement purposes by a federal agency even when enforcement proceedings have been terminated. In view of our experience with this act, it seems to me that our efforts to enact new legislation to help bring the government decision making process into public view should anticipate agency reluctance to cooperate with this type of act.

In light of the posture taken by the Executive branch of government with regard to the "Pentagon Papers," I feel that section 3 of S. 260 is too broad in its definition of national security. Subparagraph (D) of this section, it seems to me, would get us right back into the position of letting the President conceal vast amounts of information, to which the public has the right of access, by alleging national security involvement.

Similarly, in Title II, section 201 (b) the conduct of secret meetings on the basis of a majority vote of the entire membership of the agency involved leaves the agencies in a position to control much information that should be immediately available to the public. The procedure for correcting this situation would be to take each individual violation to court; a costly and time consuming process at best.

How much better it would be for the agencies desiring to conduct secret meetings to have to justify such action in advance to some appropriate congressional committee than to allow them to hold secret meetings on their own initiative and be required to defend their actions later only if challenged. I further see no penalties stipulated in S. 260 for agencies which habitually violate this act. The experience of the press has shown that access to information through court action, long after the information should have been available to the public, is of decidedly limited value in most cases.

I am in full agreement with you, Senator Chiles, that the time has come for a "Government in the Sunshine Act." I believe, however, that S. 260, as it is presently constituted, allows far too much latitude to the Executive Branch and to the various federal agencies to conceal in-

formation from the public. I would, therefore, urge further revision of the bill to anticipate these shortcomings before the final version is presented for Senate adoption.

Very truly yours,

ROBERT E. CATES, LL.B., D.Litt.,
Assistant Professor, Journalism.

WEST HARTFORD NEWS,
West Hartford, Conn., July 9, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR ABE: Thank you for the inquiry about the "Sunshine Act," although I'm afraid it would take more experience in Washington than I've had to be able to guess what practical effect it would have as drawn. With so many and such complicated exceptions required by the exigencies of national government, I am dubious to what extent open meetings can become the "basic norm."

But all of us who have been associated one way or another with the unfettered access of the public to the processes of policymaking can applaud any effort away from closed meetings as the basic norm.

One of the problems is that there are such myriads of meetings with potential import to the public, even if the policy becomes "open" the media simply will not be staffed to cover them, and the "public" is more likely to be "represented" by self-serving lobbyists than through genuine citizen attendance. This happened here in Connecticut when the legislature opened its committee meetings. Some lawmakers got a jaundiced feeling that maybe neither the public nor the press really did care, except in the most obviously controversial contexts.

The bill seems sufficiently explicit about the virtually limitless list of exceptions to the basic norm of open meetings, and about the steps for remedy in case the exception is not justified. My worry would be about the delay in court remedies and the general disinclination of the judiciary to get into administrative affairs except on constitutional issues, as well as the awesome political implications of asking the Senate to overrule an executive session of some government decision-making body.

I do not intend to be negative, for Congressional action is long overdue to stem the increasing temptation for government to do the public's business in private (Connecticut is rife with examples of this trend, and I gather the same is evident on the national scene) but it is important not to create the impression that the basic norm is openness when in fact the reality is that the exceptions are the rule. Every little guy in government quite honestly feels his decision impinges greatly on the world and thus deserves an immunity under the rubric of "national security." To legislate shadow without substance is further to lull an already numb public.

Yours sincerely,

BICE CLEMOW, *Editor.*

BOOTH NEWSPAPERS, INC.,
Ann Arbor, Mich., July 11, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

SENATOR: Many thanks for giving me the opportunity to review your bill and to express my thoughts. I can fully support the concept of complete exposure and expression of information to the public. As District Judge Mitchell Cohen stated in the case of the Council (N.J.) Courier Post v. Caspar W. Weinberger, U.S. Secretary of HEW, "The best governed society is an informed society. A responsible press has the obligation to keep the public abreast of governmental activity."

Any action that makes it easier to fulfill this obligation has my endorsement. I would give unconditional support to S. 260 if the "certain exemptions" were more clearly defined. Experience and history have made me wary of generalizations—too many "cuties" in the practice of law and politics feel it is their position to develop methods to skirt the law as well as ignore the intent of it.

In the interest of expediency, I have been brief in answering your request. I will take additional time to study your bill and if I feel further details or expression would be beneficial, I will most certainly write you.

Sincerely,

GORDON CRAIG.

THE ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION,
St. Paul, Minn., July 20, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: I have read your proposed new Government in the Sunshine Act. I heartily endorse it.

Of course, I would prefer if the exemptions to the open meeting provisions were more limited than they are. Such things as trade secrets, internal committee affairs, defamation of an individual, etc. can be given a broad interpretation. The terms can be abused in order to justify closed sessions.

There is, I notice, provision for review. An individual also can test the committee (or agency) action in court. That is a major step in the right direction. Enforcement provisions are vital to the success of such an act.

The need for reform in this area is, I believe, obvious. Although both houses of Congress have, from time to time, endorsed the open meeting principle, most committee sessions remain closed. Certainly it is difficult to force federal administrative agencies to open their meetings.

In Minnesota we recently adopted a new open meeting law which has some exemptions (few) but also provides that any citizen can bring a civil action in district court against a public official who participates in a closed meeting. If found guilty, the individual can be

fined $100. For the third violation, the individual can be removed from office.

The law goes into effect next May. I believe it will open many more meetings to the public. I am delighted to see Congress taking similar steps.

Sincerely,

JOHN R. FINNEGAN,
Chairman, Freedom of Information Committee.

URBAN AMERICA UNIT,
New York, N.Y., July 9, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: Thank you for your request for comment regarding S–260, the Federal "Government in the Sunshine Act."

As a television investigative documentary producer and reporter, I welcome any legislation which enables the media as well as private individuals to find out more easily what elected and appointive officials are doing.

In reading the proposed legislation and discussing its provisions with some of those involved in drafting it, I think it reasonable to suggest that it be specifically written into the law that all meetings of Congressional Committees and multi-member Federal agencies be open to "electronic and film" media. Frankly, I wouldn't put it past some Committee or Regulatory Agency Chairman to interpret the law as opening the meetings to the print press while excluding electronic and film media. And because of this distrust (based on experience), I'd like to see the law with every possible loophole closed in advance. The electronic/film media reporters represent millions of American citizens who have neither the funds nor the time to attend such hearings, and they should never be banned from a hearing room.

You ask how the "Government in the Sunshine Act" would affect my working relationship with Congress and government agencies. Practically speaking, I suppose that if the law were passed I would wind up covering Congressional and Federal Agency hearings much more frequently. The value of such hearings from my point of view is that the witnesses are usually testifying under oath. We don't swear in people prior to a TV interview, and therefore the odds are more likely that a person would be considered more believable at a hearing than at an interview. Also, these bodies can subpoena witnesses—we can't. If getting the truth to the greatest number of Americans is what you are after, then S–260 is certainly another valuable weapon in that effort.

I understand that a survey of Washington newsmen taken last year for Senator Chiles showed that most "old line veterans" weren't too interested in S–260. That's probably why Watergate was broken by two hard-driving staffers from the Metropolitan Desk of the Washington Post. Bernstein and Woodward have been quoted as saying that anyone who knew administration officials on a first name basis was useless in the original Watergate investigative reporting effort. Judg-

ing from their success, and from the mental attitude the survey suggests, you need some input from newsmen who don't have lunch with Henry Kissinger regularly. There are dozens of them here in New York who fit that category. I'm taking the liberty of sending a copy of your letter and my letter to Russell Tornabene, President of the New York Chapter (Deadline Club) of Sigma Delta Chi. Mr. Tornabene can be reached at NBC in New York, and if you need witnesses to support S–260 at your forthcoming hearings, I'm sure he can find a plethora of volunteers.

Sincerely,

DICK HUBERT,
Executive Producer.

cc: Senator Lawton Chiles.

COLUMBIA BROADCASTING SYSTEM, INC.,
Washington, D.C., August 6, 1973.

Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: Let me say how much I enjoyed my recent meeting with you to discuss your proposed amendments to the election reform bill, and how much I appreciate your taking time out from a busy schedule to exchange thoughts with me.

On another subject, let me say that we at CBS have reviewed your Government in the Sunshine Act (S. 260) and are extremely enthusiastic about it, both as individual citizens and as representatives of the media.

We would stress in connection with the bill the need to recognize that no meeting is a truly "open" meeting which does not afford to the print and broadcast press opportunity to fully report on its proceedings. In this country it is the press, in most instances, which opens up windows and allows the sunshine to come in.

Your bill would permit the press to operate even more effectively on behalf of the public's right to know and we would be appreciative if you could let us know what we can do to further its enactment.

With best regards,

Sincerely,

RICHARD W. JENCKS,
Vice President.

ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
Washington, D.C., July 20, 1973.

Hon. ABE RIBICOFF and Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN AND SENATOR CHILES: Thank you for your letter of July 2, soliciting our views on Senator Chiles' "Government in the Sunshine Act." If I am not mistaken, Sen. Chiles' home state of Florida has led the nation in adopting this sort of legislation at the state level, and we are pleased to note its introduction in the Congress.

We would prefer to defer any detailed statement on the provisions of S. 260 until you have scheduled hearings and we have had a chance to make a detailed analysis of the legislation. We would appreciate being advised when hearings are scheduled, at which time we would decide whether to request time for oral testimony, or to submit a statement.

Let me say, in general, however, that we do perceive a need for legislation of this sort, and that recent events only underscore the importance of conducting the public's business in public. Unquestionably we could do a better job of representing the membership of our Association, 260-plus publishing houses which annually publish more than three-fourths of the nation's books and educational materials, if more governmental meetings were open to public view.

If I may be permitted a personal note, I am a member—and former National Freedom of Information Chairman—of Sigma Delta Chi, the professional journalistic society which has long advocated, with some success, state open-meetings laws.

Thank you for the opportunity of presenting our views.

Sincerely yours,

RICHARD P. KLEEMAN,
Director, Washington Office.

THE JEFFERSON GAZETTE,
Jefferson, Ohio, August 8, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR MR. RIBICOFF: Thank you for your recent inquiry on S.B. 260, the Federal "Government in the Sunshine Act." If we are to continue to be a free nation, I believe this type of legislation is most necessary to keep an informed citizenry.

While I am located some distance from Washington, I believe this legislation has a direct bearing even to the citizens of this community. Such legislation can serve as a model for the State Legislature to follow. It would aid in the flow of public information in dealing not only with State Agencies but also those on the County level.

While I realize my comments are brief, I do hope that your committee and the Hon. Lawton Chiles, Senator from Florida will pursue the enactment of the "Sunshine Act" with all your energies.

Thank you for seeking my comments.

Sincerely yours,

JOHN LAMPSON, *Editor.*

GUY GANNETT PUBLISHING CO.,
Portland, Maine, July 11, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: S. 260, "Government in the Sunshine Act" should make more information available to the public on what Con-

gress and Federal agencies are doing. That would be highly desirable.

It also should improve the ability of news media to communicate information by providing a better base for news judgment and better access on the spot or subsequently.

We have our own news representation in Washington but the bulk of our report depends on the two wire services and the news services of the Christian Science Monitor and the Washington Post.

Such legislation by example might also have an important effect on improving coverage of state government with which we have a much more direct and personal involvement.

Sincerely,

GEORGE F. MARSHALL, Jr.

NATIONAL NEWSPAPER ASSOCIATION,
Washington, D.C., July 6, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: I am responding to your recent inquiry concerning S. 260, the Federal "Government in the Sunshine Act" which is currently before the Subcommittee on Reorganization, Research, and International Organizations for consideration.

This Association has always supported efforts to make government bodies act in the open and to maintain records that are freely accessible to the public.

Based on this history, we would be delighted to support, I am sure, S. 260.

Our Association's legislation committee and Board of Directors have not yet formally considered this legislation, but I am sure we could have a formal position adopted by the time Committee hearings are held.

With that in mind, we would appreciate it very much if you would set some time aside for NNA to testify on this important subject.

Many of our affiliated state and regional newspaper organizations are familiar with the workings of similar laws at the state level and we will try to draw on their experience and expertise in formulating our own testimony. I am sure that the Committee would find information of this type to be helpful.

I appreciate your soliciting our views and I hope that you will be able to find time for NNA to be represented during your hearings which you plan to hold in the near future.

Sincerely yours,

WILLIAM G. MULLEN.

OTTAWAY NEWSPAPERS, INC.,
Campbell Hall, N.Y., August 20, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: Thank you for your invitation to comment on S. 260, the federal "Government in the Sunshine Act."

Our long-held dedication to open-records and open-meetings laws continues undiminished. Simply put, we think our durable democracy works best when citizens and media have unobstructed access to full information about our government and its decisionmaking processes.

Please record us enthusiastically in favor of the free-access concept of S. 260—and the fewer exceptions, the better.

Thank you again for the opportunity to file this opinion.

Sincerely yours,

JIM OTTAWAY, Jr.

cc: Senator Lawton Chiles.

SELL PUBLISHING CO.,
Forest Lake, Minn., August 23, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: Please excuse my delay in answering your letter of 2 July 1973. I hope any comments I will make here will still be of some value. I am chairman of the Freedom of Information Committee of the Minnesota Newspaper Association, and have been for two years. I am also a member of the Joint Committee of News Media in Minnesota which assisted our chairman, John R. Finnegan, executive editor, St. Paul Dispatch and Pioneer Press, in presenting a so-called "Reporter's Shield Bill" and a revised so-called "Open Meeting Law" to our Minnesota Legislature at the last session.

Our Joint Committee succeeded in gaining passage of the two bills; however, it was necessary to negotiate on both. We are generally happy with what we have. Of course, there is a bit of apprehension among all journalists about the need and result of such legislation. The argument is that we have the First Amendment to the Constitution and that we ought to sink or swim with it. Any legislation passed to allegedly embellish on the First Amendment can also be turned around to limit it.

Enclosed please find a copy of our "Open Meeting Law" as recently revived with new language. Note, however, that this revision does not take effect until 1 May 1974.

If you will permit me to explain: The phrase "by law statute" in the second line was a change of considerable importance. We found that new agencies formed in state government were including a clause in their enactment legislation which closed their activities to the public. This revision prevents that. It is difficult to draw legislation to cover every kind of get-together among persons at which discussion and decision might take place, therefore, we had to add the further clarification of "any committee, subcommittee, board, department or commission thereof." Note also the exceptions: "the board of pardons, the adult corrections commission and the youth commission." Also, "any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary proceedings."

I think you'll find it interesting that we added a penalty section. An open meeting law is of little real value without some teeth. This we feel we have established with the three times and out approach.

Whether or not it will hold up remains to be seen. But at least our legislature went along with it this far.

I enclose the Minnesota bill and my comments because they may be of some help in analyzing S. 260, "Government in the Sunshine Act." First of all, to be effective, nearly every possible sub-committee or name of any group must be included. Those groups which this law is not meant to cover must be clearly indicated in the law. Closing a meeting because of the reputation of an individual needs to be closely examined. At one stage involving personnel examination, perhaps, but at another stage which shows the individual's standing to have some effect on his performance or the government, no. Also, unless you let anyone lodge a complaint, and unless a misdemeanor conviction can result, there is not nearly the enforcement strength. But I realize that opens up a whole new problem in regard to Congress.

It would seem that this kind of legislation should not be necessary after nearly 200 years of government. But perhaps today we are more aware of what has been actually going on during all of those 200 years—there is secrecy in government which must be eliminated in all except very specific instances. If government does not voluntarily do this for itself, as it very well could in individual interpretation of the First Amendment, then the people need to see that it is done through strong legislation.

These days, such a strong piece of legislation would help once again to restore more faith in government. Through my experience of about 30 years in this business as a member of a newspaper family and a practicing journalist, I have found that if any government wants the respect and faith of its citizens it had better be open with them and not be caught hiding anything. It is that simple. Given that respect and faith a government can accomplish just about anything.

Thank you for asking me for my comments. I am sincerely honored. I hope these many words are of some value.

Sincerely,

DUANE A. RASMUSSEN,
Publisher.

cc: Senator Lawton Chiles.

AN ACT Relating to meetings of state agencies and of governing bodies open to public; providing a penalty; amending Minnesota Statutes 1971, Section 471.705, repealing Minnesota Statutes 1971, Section 10.41.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Minnesota Statutes 1971, Section 471.705, is amended to read:

471.705 (Meetings of Governing Bodies: Open to Public.) Subdivision 1. Except as otherwise expressly provided by law statute, all meetings, including executive sessions, of any state agency, board, commission or department when required or permitted by law to transact public business in a meeting, of and the governing body of any school district however organized, unorganized territory, county, city, village, town of, borough, or other public body, and of any committee, subcommittee, board, department or commission thereof, shall be open to the public, except meetings of the board of pardons, the adult corrections commission and the youth commission. The votes of the members of such state agency, board, commission or department or of such governing body, committee, subcommittee, board, department or commission on any action taken in a meeting herein required to be open to the public shall be recorded in a journal kept for that purpose, which journal shall be open to the public during all normal business hours where such records are kept. The vote of each member shall be recorded on each appropriation of money, except for payments of judgments,

claims and amounts fixed by statute. This section shall not apply to any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary proceedings.

Subd. 2. Any person who violates subdivision 1 shall be subject to personal liability in the form of a civil penalty in an amount not to exceed $100 for a single occurrence. An action to enforce this penalty may be brought by any person in any court of competent jurisdiction where the administrative office of the governing body is located. Upon a third violation by the same person connected with the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving. The court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection therewith and, upon finding as to the occurrence of a separate third violation, unrelated to the previous violations issue its order declaring the position vacant and notify the appointing authority or clerk of the governing body. As soon as practicable thereafter the appointing authority or the governing body shall fill the position as in the case of any other vacancy.

Section 2. (Repeal.) Minnesota Statues 1971, Section 10.41, is repealed.

Section 3. This act may be cited as the "Minnesota Open Meeting Law".

Section 4. The effective date of this act is May 1, 1974.

THE NEW YORK TIMES,
New York, N.Y., July 10, 1973.

Hon. ABE RIBICOFF and Hon. LAWTON CHILES,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF AND SENATOR CHILES: I appreciate the opportunity you gave me to comment on S. 260, the "Government in the Sunshine Act." I am neither an attorney nor a legislator so I hesitate to endorse any specific bill. But I am most eager to say this: I believe that government activities should be conducted in public to the fullest extent possible and that any legislation that leads toward that is a contribution to our open society.

Sincerely,

A. M. ROSENTHAL,
Managing Editor.

LINCOLN EVENING JOURNAL,
NEBRASKA STATE JOURNAL,
Lincoln, Nebr., July 19, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: Your letter of July 2, 1973 inviting comment on the need for reforms embraced in S. 260, the Federal "Government in the Sunshine Act," is appreciated.

I should like to respond by saying that the provisions of this act get at the very heart of what is most needed to evoke confidence in government and to invite the full participation of citizens in the lawmaking and decision-making processes of our political institutions.

We have all become used to the idea that a dichotomy must prevail between government and the press. But I should like to suggest that the business of running a democracy is too important to make it a guess-

ing game or a contest between the government, the news media and the electorate.

As you know, the Associated Press and United Press International provide the primary news reports to radio, television, newspapers and news magazines. Many news institutions such as ours do not have the economic capability to support a separate Washington reporting staff. Full and ready access to the sources of vital information is essential to the economical dissemination of news in this country and around the world. The ability of the wire services to provide meaningful reporting at a cost member papers or clients can pay is very much wrapped up in the whole issue of access.

In my judgment, the reforms proposed in S. 260 would aid to a very considerable extent the ability of national reporters to do an effective job for the outlets they serve. This is why I am emphasizing this aspect of news source access.

I see the "Government in the Sunshine Act," as being a wholesome and vital step toward improving our working relationship with Congress and administrative agencies in two respects: (1) through making easier and more effective the reporting done by all news agencies, and (2) making available to us the records essential to complete and accurate reporting when we as an individual newspaper initiate inquiries on behalf of our readers.

In Nebraska we have come to appreciate and expect this sort of open, "fish bowl" government. Our State legislature holds open committee hearings. We have an open meetings statute and an open records statute and these apply as well to school boards and to local governments. The 1973 session of our unicameral legislature also passed an unqualified news source protection bill.

It is more than coincidental that Nebraska as a state and its local governments are virtually free from corruption of any magnitude. There is confidence in government. People know where their elected officials stand and they know what is going on in the various state and local administrative agencies. In short, I think our experience in Nebraska shows that, through the news media, legislators and administrators alike can perform their roles most effectively in full view of the public.

My interest in S. 260 is intensified by my deep conviction, based on 32 years of reporting and news editing, that the people and government are best served by a full accounting of government activities. I write as a member of the national Sigma Delta Chi Advancement of the Freedom of Information Committee and as chairman of its similar state-level committee. I am also a member of the Freedom of Information Committee of the National Newspaper Association, an organization of some 7,000 daily and non-daily newspapers.

The Subcommittee on Reorganization, Research, and International Organization could perform no more important function than to successfully foster the enactment of S. 260. America needs this reassertion of the power of Congress in its national life.

Again, thank you for providing an opportunity to express my views on S. 260.

Sincerely,

GILBERT M. SAVERY,
News Editor.

CBS NEWS,
A DIVISION OF COLUMBIA BROADCASTING SYSTEM, INC.,
Washington, D.C., July 16, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: Thank you very much for sending me a copy of S. 260, Senator Chiles' "Sunshine Act". Needless to say, anything that opens up Congressional committees and Federal agencies is a great step forward. Too much of government is conducted behind closed doors and as current events dramatically demonstrate, had we in journalism been able to reveal more of government to the general public, some of the grievous errors of our day might have been avoided.

While there are always problems, including the problem of definition, with a concept such as "National Security" it is obvious that legislation of this kind—or any bill compelling an increase in open meetings—is much needed. The very enactment of such legislation sets a proper tone for you and other elected officials to share the opinion that every American deserves to know more about the operation of his government.

Lawton deserves our thanks for sponsoring such legislation and I hope your Subcommittee on Reorganization, Research, and International Organizations will proceed with the recommendations that such legislation be passed.

With warm personal regards,

WILLIAM J. SMALL,
Vice President.

cc: Senator Lawton Chiles.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Washington, D.C., July 25, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN RIBICOFF: We thank you for your letter of July 2 inviting our comment on S. 260, the "Government in the Sunshine Act" sponsored by Sen. Lawton Chiles and others. This Association, whose members have more than 90 per cent of the total daily newspaper circulation in the United States, is vitally interested in all steps which help open up the government to the public in the manner the founding fathers intended.

It is our opinion that S. 260 represents a carefully thoughtout attempt to open the Congress and Federal agencies to closer public scrutiny. As is always the case in legislation of this kind, it is subject to refinement, particularly in the case of exceptions, if testimony at hearings indicated a need for more strict or more lenient criteria. However, we support and commend the principles in the Bill.

You ask whether we feel this reform is needed. Without hesitation, I can answer that we believe the need has been amply demonstrated. Government conducted in secret is not a government of the people.

To your second question, ". . . would this change our working relationship with the Congress and government agencies?" I would answer emphatically that it would improve the relationships of the reporters for all media with the Congress and the agencies. It would facilitate the flow of news and promote public understanding. The principle of Freedom of the Press embodied in the First Amendment dictates that information concerning government operations is of paramount importance to citizens who must participate in the decision-making process.

We in the media understand that some government business must be conducted out of the public's view for reasons of national security or in certain circumstances to insure the continuing operation of the Federal system. But disregard for permitting the people to have the information to which they are entitled has lessened their faith in the governmental process. This situation can only be rectified by legislating more open meetings and making more information available.

It is in this cause that we support S. 260 and other measures designed to enhance the people's right to know.

With high esteem.

Sincerely yours,

STANFORD SMITH, *President.*

MARQUETTE UNIVERSITY,
COLLEGE OF JOURNALISM,
Milwaukee, Wis., July 24, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: In answer to your request for my opinion of S. 260, the Federal "Government in the Sunshine Act," with Senator Lawton Chiles the chief sponsor: The five exceptions seem to balance fairly the good of individuals, on the one hand, and the good of the country as a whole, on the other hand. I feel that any Congressional Committee and any multi-member Federal agencies must emphasize the good of the whole country in any discussion as to whether a meeting should be closed.

In this day of jet plane travel, a seven-day notice should provide plenty of time for anyone to attend from any of the 50 states. The committee or the agency should inform the public quickly in simple language—time, place and subject—to help encourage a closer relationship of citizen and his government.

In a sense S. 260 would seem to encourage a little of the old town hall meeting atmosphere—permitting the individual citizen directly to help his representatives to run the country. Further, reporters would be able to inform citizens unable to attend meetings but nevertheless vitally interested in legislative or other discussions at the committee or agency level.

Those who exercise political authority in a democracy must continually report to the public—and this bill would widen the report area. To the extent that the public has opportunity to know what government is doing, to that extent the public has a chance to remain

vitally interested and to encourage competent government and discourage incompetence and corruption.

I favor the bill as a working journalist and as a teacher of journalists, too. A country as wonderfully complex as ours is difficult to run—and S. 260 could play a part in easing the problems. Let me know if I can be of further assistance in this matter.

Sincerely,

LUCAS G. STAUDACHER, *Professor.*

UNIVERSITY OF KENTUCKY,
DEPARTMENT OF JOURNALISM,
Lexington, Ky., July 24, 1973.

Hon. ABE RIBICOFF,
Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR SENATOR RIBICOFF: Thank you for your letter of July 2 concerning S. 260, the Federal "Government in the Sunshine Act."

I am a teacher of journalism, not a lawyer, so my remarks should be interpreted accordingly. Frankly, I regard S. 260 as half a loaf, but as one who hungers to see the public's business conducted more openly, it is a welcome half-loaf.

First, I would disagree with those newsmen and others who may say that such legislation creates more difficulties than it solves by putting a considerable number of exceptions into statutory form. My own view is that despite the various exceptions listed, the admirable "Declaration of Policy" is a great public service because it would place a declaration, broadly stated, in favor of freedom of information on the statute books.

If I could tinker with the language of Section 2 of S. 260, I would strike the word "practicable," and substitute "possible." Also, and this second point of mine may not be well taken, I have an emotional attachment to the First Amendment." So, I suggest that Section 2 be reworked to read:

"SEC. 2. In support of the public's right to know guaranteed by the First Amendment, it is hereby declared to be the policy of the United States that the public is entitled to the fullest possible information regarding the decision making process of the Federal Government."

As I read on in to S. 260, I bridle at definitions (A), (B), (C), and (D). Perhaps they are necessary, but it seems to me (if only by a tortured construction) that many of the buggings, surveillances, and "tricks" revealed by the Watergate hearings being conducted by Senator Ervin could all be justified by such language. The distaste for "demonstrators," the apparent fears that some anti-Administration activities were linked to foreign powers—if accurately depicted in the Watergate hearings—would seem to put an unfortunate gloss on the language used in the section labeled "Definitions." To put it another way, the catch-phrase "national security" has been used all to often to cover up matters from the public and the press which had nothing at all to do with national security.

Paragraph (B) under Subsection (5) of Section 133C also gives me pause. How many Federal statutes are there which require "information to be kept confidential by government officers and employees?" Is there an up-to-date compilation of Federal statutes affecting the availability of information?

I approve of Paragraph (C) of Subsection (5) of Section 133C(a) which would require a separate vote of each committee or subcommittee meeting which is to be closed, and that votes of each committee member participating in each vote should be recorded and published.

Finally, I also approve in principle Section 133C(e) concerning the raising of a point of order against committee votes to close a meeting to the public. This is a rather cumbersome remedy to secret meetings, perhaps, but better a cumbersome remedy than none at all.

Although I may be speaking from a vast fund of ignorance here, Title 2 concerning the decision-making process of Federal Agencies seems to me to contain useful statements of public policy against secrecy.

In conclusion, I concur with the sentiments of Senator William V. Roth, Jr. that the "Government of Sunshine Act" does not represent the whole response to governmental secrecy. As he noted, such legislation is important because it will call forth "hearings on a range of different kinds of legislation dealing with both executive and legislative secrecy and with the processes of Government as well as Government documents."

Again, I thank you for sending S. 260 to me and for giving me the opportunity to respond to it. I congratulate you for your concern about the crucially important problem of minimizing government secrecy.

With all best wishes.

Sincerely,

DWIGHT L. TEETER, Jr.
Associate Professor.

WTAG,
Worcester, Mass., July 26, 1973.

HON. ABRAHAM RIBICOFF,
Senate Office Building,
Washington, D.C.

DEAR SENATOR RIBICOFF: Thank you for the opportunity to comment on S. 260, the Federal "Government in Sunshine Act."

I have long believed firmly in the people's right to know. The fact that a majority of the people fail to exercise that right has never been a viable excuse for any government body to conduct business in secret.

Because the general populance tends to pay little attention to the operations of our government does tempt any government body to operate in a manner that can, at times, be detrimental to the people and excuse any mishandling of public business by saying the people did not speak out.

It is my opinion the higher responsibility of those elected to representative office to be sure the public has every opportunity to know and be part of the governmental process. I believe, therefore, that by opening up all meetings of all government agencies to the public,

which, in the mai n, will be represented by the press, the Congress will be following the l asic principles of a free and open society.

I'm sure that r nany of my colleagues will have already pointed to Watergate as an (xample of what happens when government becomes too clandestine ir its operations, but the fact remains Watergate is an excellent exam ple of just that.

I heartily supp ort such a measure and will be watching to see what happens with the nearings and debate.

Sincerely,

RICHARD F. WRIGHT,
News Program Director.

○